No. _____

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THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

GENE AND KATHLEEN SOUTHARDS, et al., Petitioners

v.

MOTEL MANAGEMENT COMPANY, n/k/a B & M MANAGEMENT COMPANY, INC., TAX COLLECTOR, Monroe County, Florida, and DEPARTMENT OF REVENUE, State of Florida, Respondents

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Petitioners own a resort time-share unit week in fee simple. The Petitioners paid their ad valorem taxes on their unit week and the Tax Collector received these monies. The Tax Collector applied these monies to partially reduce the taxes due for the entire resort. Does it violate the due process and equal protection safeguards of Petitioners' fundamental property rights for the Tax Collector to sell the Petitoners' property for tax arrearages even though Petitioners have fully paid their taxes?

2. Is it an unconstitutional taking for the Tax Collector to sell the Petitioners' property for tax arrearages even though the Petitioners have fully paid thier taxes?

LIST OF PARTIES

The parties to the proceedings below were the petitioners, Gene and Kathleen Southards, as class representatives of 883 owners of time-share units at Ocean 80 Resort, located in Islamorada, Florida.

Respondents were Motel Management Company, n/k/a B & M Management Company, Inc., Harry F. Knight, the Tax Collector for Monroe County, Florida, and J. Thomas Herndon, Executive Director, the Department of Revenue, State of Florida.

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OPINIONS BELOW

The opinion of the District Court of Appeal, Third District, State of Florida, is reported at 610 So. 2d. 524, and is reprinted in the Appendix hereto, p. A-1, *infra*. The order of the Supreme Court of Florida denying the Petition for Review is reported at 1993 Fla. Lexis 780. It is reprinted in the Appendix hereto, p. A-11, *infra*.

The order for final summary judgment of the Circuit Court of the Sixteenth Judicial Circuit, in and for Monroe County, Florida has not been reported. It is reprinted in the Appendix hereto, p. A-18, *infra*.

BASIS OF JURISDICTION

The judgment giving rise to this Petition for Writ of Certiorari was entered by the District Court of Appeal, Third District, State of Florida, on December 1, 1992, affirming the lower court's Order Granting Summary Judgment. The court of appeal denied a timely Petition for Rehearing on January 26, 1993. Thereafter, on May 5, 1993, the Supreme Court of Florida denied a Petition for Review. Jurisdiction of this Court is invoked under 28 U.S.C. § 1204, pursuant to Rule 10.1(b) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioners, Gene and Kathleen Southards, pursuant to Rule 14.1(f) of the Rules of the Supreme Court, notify the Court of their intent to rely upon the following Constitutional provisions:

The Fifth Amendment to the Constitution of the United States in pertinent part:

> No person shall . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the Constitution of the United States in pertinent part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protections of the laws.

Rule 10.1(c) of the Rules of the Supreme Court of the United States sets forth in pertinent part, that certiorari may be granted:

> When a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with the applicable decisions of this Court.

STATEMENT OF THE CASE

The Petitioners, Gene Southards and Kathleen Southards, his wife ("Southards"), are fee simple owners of a one week time-share unit at Ocean 80 Resort ("Resort"), located in Islamorada, Florida. During the period of 1984 through 1988, the Southards regularly paid the assessments billed to them by the managing entity of the Resort which included a portion labeled for the payment of the ad valorem taxes on the Resort.[1]

Of the 4,029 unit weeks at the Resort, only 883 unit owners regularly paid the assessment billed them by the managing entity. Because of this shortfall, the managing entity failed to collect sufficient sums from the unit owners to pay the ad valorem taxes. For each year from 1984 through 1988, the managing entity failed to pay the Tax Collector the total amount of ad valorem taxes due and the Tax Collector

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1 Section 192.037(5), Florida Statutes (1991), provides: The managing entity, as an agent of the time-share period title holders, shall collect and remit the taxes and special assessments due on the fee time-share real property. In allocating taxes, special assessments, and commons expenses, to individual time-share period title holders, the managing entity must clearly label the portion of any amounts due which are attributable to ad valorem taxes and special assessments.

refused to accept partial payment from the managing entity or from the Southards.[2]

Contrary to the partial payment prohibition, the Tax Collector received and applied a good faith deposit of $178,509.98[3] from the managing entity, on behalf of the Southards and other unit owners who had paid their assessments, to reduce the outstanding ad valorem tax indebtedness on the entire Resort.

The Tax Collector offered for sale and Motel Management Company, n/k/a/ B & M Management Company, Inc. ("Motel") purchased the tax certificates for the unpaid balance of the taxes on the Resort, which included the Southards' property interest. Faced with the imminent loss of their property, on March 30, 1990, the Southards filed a class action lawsuit to petition:

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2 Section 192.037(7), Florida Statutes (1991), provides the tax collector shall accept only full payment of taxes and special assessments due on the time-share development.

3 The managing entity filed suit in Monroe County, Florida contesting the ad valorem tax assessment for 1984, 1985, 1986, and 1987. Section 194.171(3), Florida Statutes (1991), required the managing entity, as a jurisdictional prerequisite, to pay the Tax Collector a good faith estimate of ad valorem taxes owed, $178,509.98. At the conclusion of the litigation, the Tax Collector reduced the outstanding tax indebtedness on the Resort by $178,509.98 and sold the tax certificates for the lesser amount.

1. For a temporary injunction to preserve their time-share property interest from the Tax Collector's auction block;

2. For a judgment declaring the tax certificates issued to Motel void ab initio and unenforceable because the Southards had already paid their taxes;

3. For a judgment declaring Section 192.037(2)(7), Florida Statutes (1991), unconstitutional as applied to them because the Southards paid their taxes, the Tax Collector accepted their money, and was now attempting to take their property.[4]

On April 12, 1990, the court entered an order denying the Southards' request for a temporary injunction. (App. at p. A-12). The Court, *inter alia*, held that Section 192.037(7), Florida Statutes (1991), was not unconstitutional in its application to the Southards. The Third District Court of Appeal reversed and remanded the case to the lower court with instructions that the injunction should be issued and that the Southards be required to post only a nominal bond.[5]

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4 Pursuant to Section 194.181(5), Florida Statutes (1991), the Department of Revenue for the State of Florida (the "Department") is a required party in any action contesting the collection of any tax, tax certificate, or tax deed on the ground that it is contrary to the state constitution.

5 *Southards v. Motel Management Co.*, 567 So. 2d 523 (Fla. 3d DCA 1990) (App. at p. A-15).

On February 19, 1992, the trial court entered Summary Final Judgment in favor of Motel and the Department, denying the Southards' Motion for Summary Judgment. (App. at p. A-18). A timely appeal to the Third District Court of Appeal was taken. In an opinion dated December 1, 1992, the Third District affirmed the trial court's ruling, holding that the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive. (App. at p. A-1). The Southards' timely Motions for Rehearing and Rehearing En Banc were denied on January 26, 1993. (App. at p. A-28). The Southards' petition for rehearing by the Florida Supreme Court was denied on May 5, 1993 (App. at p. A-11).

The constitutional issues of due process, equal protection, and the loss of fundamental property rights have permeated this case from the beginning. The references to these arguments are voluminous and are attached in the Appendix in accordance with Rule 14.1(k) of this Court.

The very first point in the Agreed Statement of Facts (App. at p. A-29), relied upon at all stages of this case, provides that the constitutionality of the statute is at issue. On appeal, the Southards' initial brief stated that, from both due process and equal protection perspectives, the application of the time-share tax statute, enacted only for the convenience of the state's tax collectors, acts to deprive the Southards of their fundamental property interest, even though they have paid their taxes. (App. at p. A-70).

As the foundation of their petitions to the trial court and their initial brief on appeal, the Southards have steadfastly insisted that, "[w]here the state seeks to regulate a fundamental right, as the Southards' property right in the present case, such regulation limiting or divesting these rights may be justified only by demonstrating a compelling state interest." (App. at p. A-93). Judge Ferguson, dissenting in the proceedings directly under review, agreed with the Southards that "[w]here a fundamental right is implicated, a strict scrutiny rather than a rational basis test is the proper standard to apply in determining whether equal protection or due process rights are violated by the statute." 610 So. 2d at 527, included in the Appendix at p. A-7.

REASONS FOR GRANTING THE WRIT

In Florida, as in all states, time-share property ownership is a creature of statute. Florida has taken the lead in recognizing this new fundamental property right and has created a statutory structure designed to protect the thousands of buyers of time-share units.[1] Unfortunately, the ad valorem tax scheme created by Florida to simplify tax collection for time-shares has, in effect, set the stage for property to be taken from the individual owner by the tax collector without compensation, even though that owner has paid his taxes.

The Southards have paid their taxes and the tax collector has taken thier money but, because Section 192.037(7), Florida Statutes (1991), precludes partial payment of time-share taxes, the tax collector refuses to acknowledge the tax dollars paid by the Southards. In this case, "[t]he very elementary question presented . . . is whether the legislature may extinguish a citizen's fundamental rights for the sake of governmental efficiency." *Southards v. Motel Management Co.*, 610 So. 2d 524, 526 (Fla. 3d DCA 1992) (Ferguson, J., dissenting).

The right to acquire and possess property, secure against divestment by unlawful State action, is fundamental, and therefore the State is without right to deprive the Southards of their property without demonstrating a compelling state interest. *Roe v. Wade*, 410 U.S. 113 (1973). As this Court has reiterated in *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992),

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1 Section 721.02(5), Florida Statutes (1991).

heightened review of a statute is required if it jeopardizes the exercise of a fundamental right. *Id.* at 2331. In order to survive the compelling state interest test in this case, Florida must show that the means it adopted to achieve the legislative goal of taxation efficiency are necessarily and precisely drawn, and that there are no reasonable, alternative means of reaching that goal. *Vlandis v. Kline*, 412 U.S. 441 (1973). Florida has failed to meet the test set forth in *Vlandis*. With regard to time-share taxation, the economy of effort of the tax collector can be achieved without prohibiting the payment of taxes by individual property owners directly to the tax collector. *See, e.g.*, Cal. Rev. & Tax. Code, Section 2188.8 and 2188.9 (West, 1990) (separate tax assessment and tax billings for time-share estates). This argument is even more compelling because the tax collector has estimated that the cost of generating and mailing property tax bills to each individual property owner is only six dollars and ninety-eight cents ($6.98). (App. at p. A-94).

The Southards have paid their taxes as they have been directed by statute for the years 1984 through 1988. They are prohibited by Florida's time-share taxation scheme from any other method of payment. Their monies have already been accepted by the Tax Collector. Notwithstanding these facts, the Southards now face the immenent loss of their property on the tax delinquency auction block, and Motel ". . . will reap the benefit of those payments, in the form of a windfall . . . ." *Southards v. Motel Management Co.*, 610 So. 2d at 527 (Ferguson, J., dissenting). This result is even more

egregious in that the institution of a fair and equitable taxation system, allowing individuals to pay their own taxes, such as the California system, would cost the tax collector so little.

The fundamental unfairness of this result, coupled with the lack of a compelling state interest, requires that this Court rule as a matter of law that the application of Section 192.037(2)(7) unconstitutionally invades the due process and equal protection rights of the Southards. The proper remedy in this case is not "just compensation," but the invalidation of Section 192.037(2)(7), so that the Souhards can keep their property. *Anthony v. Franklin County*, 799 F.2d 681, 684 (11th Cir. 1986).

CONCLUSION

For the reasons set forth above, the Petitioners respectfully request this Court grant their Petition for Writ of Certiorari.

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APPENDIX

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1992

GENE SOUTHARDS and
KATHLEEN SOUTHARDS,
husband and wife,

Appellants,

vs. CASE NO. 92-544

MOTEL MANAGEMENT
COMPANY, n/k/a B & M
Management Company, Inc., a
Florida corporation, HARRY
F. KNIGHT, Tax Collector,
Monroe County, Florida,
and J. THOMAS HERNDON,
Executive Director, Department
of Revenue, State of Florida,

Appellees.

Opinion filed December 1, 1992.

An appeal from the Circuit Court of Monroe County, J. Jefferson Overby, Judge.

Cullen & Jabro and Russell H. Cullen and John A. Jabro (Key Largo) for appellants.

Robert A. Butterworth, Attorney General, and Lee R. Rohe, Assistant Attorney General, (Tallahassee); Herbert Stettin and Pamela K. Stettin, for appellees.

Larry E. Levy (Tallahassee) for Property Appraisers' Association of Florida, as amicus curiae.

Before BARKDULL and HUBBART and FERGUSON, JJ.

PER CURIAM.

This is an appeal by the plaintiffs Gene and Kathleen Southards, as class representatives of certain interval owners of a condominium complex, from an adverse final summary judgment in a declaratory decree action challenging the enforceability of tax certificates held by the defendant Motel Management Company. The plaintiffs contend that Section 192.037 (2)(7), Florida Statutes (1991) is unconstitutional as applied to this case based on due process and equal protection grounds. The plaintiffs also contend that the subject tax certificates are unenforceable because the defendant Harry F. Knight, Tax Collector of Monroe County, accepted a good faith payment of ad valorem property taxes herein from the managing entity of Ocean 80 Resort. We cannot agree and affirm.

First, Section 192.307, Florida Statutes (1991), has been held facially constitutional as against an attack based on due process and equal protection grounds. Day v. High Point Condominium Resorts, Ltd., 521 So. 2d 1064 (Fla. 1988). We discern no substantial difference between this failed attack and the plaintiffs' due process and equal protection attack on the statute in the instant case, except that here the plaintiffs claim that the statute is therefore invalid as applied; as conceded by the plaintiffs, however, at oral argument in this case, if the statute is unconstitutional as applied in this case, it is unconstitutional as applied in all cases -- a result which the court in Day clearly rejected. This being so, the plaintiffs's

constitutional assault on the statute cannot be accepted. As stated by the trial court in the final summary judgment under review:

> "20. Florida Statute Section 197.037 has already been determined to be constitutional on its face. Day, 521 So. 2d at 1066-67. It is also constitutional as applied. It satisfies the test used in determining whether an act is violative of the due process clause, that is, 'whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive.' Day, 521 So. 2d at 1066-67.
>
> 21. The legislative objective in enacting Section 192.037, F.S., was to address the unique problem caused by subdividing a condominium unit into multiple time-share units. The legislature is allowed a very broad degree of latitude in this area. Day, supra. The Supreme Court of Florida has already determined the statute was enacted to address the administrative assessment and collection problems for taxing authorities caused by the fee time-share concept.
>
> 22. The statute clearly bears a reasonable relation to the permissible legislative objective of erecting an efficient assessment and collection process in the face of a vast number of time-share owners of a single condominium unit. Any other arrangement would create wholesale disarray and

impede the tax assessor and the tax collector in the performance of their jobs.

23. Finally, the statute is not discriminatory, arbitrary or oppressive. First of all, it treats fee time-share owners in the same manner as all other multiple ownership, property owners; that is there is only one tax notice sent instead of a separate notice sent to each owner. Next, the statute provides a means of redress to the managing agent, as representative of time-share owners who have paid their assessments, as against those owners who have not paid. See Section 192.037(8), F.S. Further, Section 192.037(4), F.S. preserves all the rights and privileges with respect to contesting or appealing assessments afforded property owners generally by Chapter 194, F.S., to both the managing entity and to each time-share fee owner; and finally, Section 192.037(9), F.S., gives time-share unit owners all of the protections available to other fee owners concerning application for a tax deed by the holder of a tax sale certificate. See § 197.502, F.S."

Second, the good faith payment of ad valorem property taxes to the defendant Knight was clearly authorized by Section 194.171(3), Florida Statutes (1991), as a precondition to a prior suit by the managing entity of Ocean 80 Resort contesting the ad valorem tax assessments for certain years. This payment in no way violates Section 192.037(7), F.S., (199), and therefore does not, as urged, render the tax certificates herein

unenforcreable. As further stated by the trial court in the final summary judgment under review:

> "24. The requirement of Section 194.171(3), F.S., that the tax collector receive from plaintiffs who contest tax assessments the amount admitted in good faith to be owing as ad valorem taxes as a condition precedent to maintaining a challenge of those taxes, the the requirement of Section 192.037(7), F.S., that the tax collector accept no less than full payment ofthe ad valorem taxes due from a time-share development are not inconsistent, and are interpreted by the Court as capable of being harmonized as was done by the tax collector in this case."

Affirmed.

BARKDULL and HUBBART, JJ., concur.

FERGUSON, J. (dissenting).

The very elementary question presented by this case is whether the legislature may extinguish a citizen's fundamental rights for the sake of governmental efficiency.

I respectfully disagree that Day v. High Point Condo. Resorts, Ltd., 521 So. 2d 1064 (Fla. 1988), which holds that section 192.037, Florida Statutes (1991), is facially constitutional, is dispositive of the instant challenge to the statute as applied in this case. It seems clear to me, from a fair

reading of Day, that the court abstained from reaching the question now presented. It noted:

> In this case, no contention has been made that the action of the property appraiser or the tax collector resulted in the issuance of notices of delinquent taxes, the sale of tax certificates, the application for tax deeds, or the issuance of any tax deeds affecting any time-share estate.

Id. at 1067. After noting those facts, the court proceeded to apply a "rational legislative basis test" in upholding the facial validity of section 192.037(1) through (5). This case challenges subsections (2) and (7) on a different ground. Moreover, critical contentions not made in Day, noted above, are present in this case.

Appellants Gene and Kathleen Southards, and other members of the class, are the owners of time-share units at a resort located in Islamorada, Florida.[1] The members of the class paid all the ad valorem tax assessments billed them by the resort's managing entity. The managing entity, however, failed to remit to the Tax Collector the total amount due for taxes because not all the unit owners had paid their assessments. If did remit, and the Tax Collector accepted, $178,509.90 in

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[1] The Southards are fee simple owners of one week of interval ownership and own a remainder in fee simple as tenants-in-common with the other fifty-one owners of their unit.

taxes, which included the assessments paid by the Southards and other members of the class.

The Tax Collector issued notices of delinquent taxes and sold tax certificates. Motel Management Company bought the tax certificates, applied for a tax deed, and sought a sale of the condominium building. We reversed the trial court's denial of an injunction to halt the pending sale of the building and remanded with instructions to conduct a hearing on the appellants' claims for equitable relief. Southards v. Motel Management Co., 567 So. 2d 523 (Fla. 3d DCA 1990). This appeal follows that hearing.

Three important points are conceded by the appellees: (1) appellants' time-share fee ownership is a fundamental property right expressly protected by article I, sections 2 and 9 of the Florida Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution; (2) the managing entity paid, and the Tax Collector accepted, $178,509.90 remitted by the Southards and other members of the class for ad valorem taxes, which sum was used to reduce the amount of outstanding taxes owed by the resort; (3) Motel Management Company will reap the benefit of those payments, in the form of a windfall, if the appellants' interests are extinguished by the pending sale of the building to Motel Management.

Where a fundamental right is implicated, a strict scrutiny rather than a rational basis test is the proper standard to apply in determining whether equal protection or due process rights are violated by a statute. De Ayala v. Florida Farm Bureau

Cas. Ins. Co., 543 So. 2d 204 (Fla. 1989); Pinillos v. Cedars of Lebanon Hosp. Corp., 403 So.2d 365 (Fla. 1981). A strict scrutiny analysis requires the judiciary to carefully examine the governmental interest claimed to determine first whether that interest is compelling and substantial, and further requires inquiry as to whether the means adopted to achieve the legislative goals are necessary and precisely drawn. In re Estate of Greenberg, 390 So. 2d 40, 42 (Fla. 1980), appeal dismissed, 450 U.S. 961, 101 S. Ct. 1475, 67 L Ed. 2d. 610 (1981).

The purpose of section 192.037 is to minimize the burden that time-share ownership creates for tax collectors. Day v. Highpoint Condo. Resorts, Ltd., 521 So. 2d 1064, 1065-66 (Fla. 1988). Weighed against the need for tax collection efficiency, are the constitutional guarantees which protect fundamental rights. In my view the claimed governmental interest is not so compelling and substantial that the constitutional right to "acquire, possess and protect property" must be sacrificed. Neither is there the slightest showing, by Motel Management or the government, that the statutory means adopted to achieve the legislative goal are necessarily and precisely drawn. See Department of Law Enforcement v. Real Property, 558 So. 2d 957, 960 (Fla. 1991) (to ascertain whether government encroachment of individual rights is justified, courts consider the propriety of the state's purpose, the substance of the right being infringed on, the nexus between the state's means and its intended goal, whether less restrictive

alternatives were available, and whether individuals are being treated in a fundamentally unfair manner).

A fair alternative is available. Appellants have called our attention to a California statutory scheme which protects the property rights of time-share unit owners by providing for separate tax assessments and billings. Cal. Rev. & Tax Code, §§ 2188.8-9 (West 1990). I suspect that under that system any additional administrative costs involved in the separate assessments and billings is passed on to the unit owners--which solves the "efficiency" problem without trampling on property rights. There is no suggestion that the California mechanism has created administrative havoc.

Finally, I must disagree with the majority suggestion that the "broad degree of latitude" held by legislatures in this area, is a constraint on the court's power to invalidate a fundamentally unfair statutory scheme which has as its single purpose a streamlining of the tax collection process. That reasoning ignores an organic role of the judiciary in our three-branch form of government. Although a court may not substitute its judgment with reference to a matter properly within the legislature's domain, Webb v. Hill, 75 So. 2d 596 (Fla. 1954), it is the duty of the court to strike down legislation which interferes with fundamental rights. State ex rel. Davis v. City of Largo, 110 Fla. 21, 149 So. 42 (1933). The challenge here is not to the legislature's substantive powers, but to its failure to adhere to due process requirements.

To the extent section 192.037(7)[2] compels the extinguishment of property rights in a time-share condominium held by unit owners who have fully paid their tax assessments--solely because all the other unit owners have not paid their assessments--the provision is unconstitutional.

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2 Section 192.037(7) provides: "The tax collector shall accept only full payment of the taxes and special assessments due on the time-share development." Subsection (5) makes clear that the time-share period titleholders shall pay all ad valorem tax and special assessment to the managing entity, and that the managing entity is to remit payments for the entire resort to the tax collector.

Of course the constitutional question may again be avoided by holding that because the tax collector did accept less than full payment, the appellees are estopped to raise section 192.037(7) as a bar to the appellants' claim for relief. The equitable remedy would be to allow the sale to proceed, with Motel Management's interest in the $10 million building being subject to the rather minuscule property interests of the appellants.

SUPREME COURT OF FLORIDA

Wednesday, May 5, 1993

GENE SOUTHARDS, ET UX.,

Petitioners,

v.

CASE NO. 81,337

MOTEL MANAGEMENT COMPANY, ETC., ET AL.,

DISTRICT COURT OF APPEAL, 3RD DISTRICT NO. 92-544

Respondents.

This cause having heretofore having been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

MCDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ. concur.

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MONROE COUNTY, FLORIDA

CASE NO 90-20-122-CA-04

GENE SOUTHARDS AND
KATHLEEN SOUTHARDS,
Husband and Wife,
Petitioners,

vs.

MOTEL MANAGEMENT COMPANY,
a Florida Corporation, and MARVIN
COOPER,
Respondents,
_____/

ORDER DENYING TEMPORARY INJUNCTION

THE FOLLOWING CAUSE having come on to be heard upon this 4th day of April, 1990, upon Plaintiffs' Petition for Temporary Injunctive Relief, and the Court having reviewed the file, the Memorandum of Law from Plaintiffs and having heard and accepted the proffered testimony and evidence as being true and correct, the Court makes the following findings of fact:

1. Plaintiffs, Gene Southards and Kathleen Southards, husband and wife, paid their ad valorem taxes in accord with Section 192.037(7), Florida Statutes, for the years 1984, 1985, 1986, 1987 to Ocean 80 Resort Owner's Association, Inc., the managing entity of Ocean 80 Resort, as described in said statute.

2. Ocean 80 Resort Owner's Association, Inc. filed suit to challenge their ad valorem tax assessment for tax years 1984 through 1987.

3. In accordance with Section 194.171, Florida Statutes, Ocean 80 Resort Owner's Association, Inc., paid Knight the following sums for the following years:

a. 1984 - $44,509.98
b. 1985 - $44,509.98
c. 1986 - $45,000.00
d. 1987 - $45,000.00

4. When the litigation was concluded, Knight applied these escrowed funds to reduce the amount of delinquent taxes owed on Ocean 80 Resort for years 1984, 1985, 1986 and 1987.

5. Knight subsequently issued tax certificates encompassing the entirety of Ocean 80 Resort, including the property interest of Plaintiffs.

Based on these findings of fact, the Court has reached the following conclusions of law:

1. The application of the escrowed funds by Knight to reduce the ad valorem tax owed on Ocean 80 Resort was lawful.

2. Section 192.037(7), Florida Statutes, is not unconstitutional as applied to Plaintiffs.

3. Because Plaintiffs have not convinced the Court that they have a clear legal right to the relief requested, Plaintiffs have failed to establish the requisite criteria needed for the issuance of a temporary injunction.

THEREFORE, it is

ORDERED AND ADJUDGED

The Plaintiffs' Petition for Temporary Injunctive Relief is hereby denied.

DONE AND ORDERED in Chambers at Marathon Monroe County, Florida, this 12th day of April, 1990.

_____

J. JEFFERSON OVERBY
Circuit Judge

A-15

Gene SOUTHARDS and Kathleen Southards, Appellants

v.

MOTEL MANAGEMENT COMPANY,
n/k/a B & M Management Company, Inc.,
a Florida corporation, Harry F. Knight,
Tax Collector, Monroe County, Florida, Appellees

No. 90-936

District Court of Appeal of Florida,
Third District

Sept. 25, 1990.

Russell H. Cullen, for appellants.

Joseph B. Allen, III and Larry Tracy, for appellee Harry F. Knight.

Before BASKIN, FERGUSON andGERSTEN, JJ.

PER CURIAM.

Appellants own an interval ownership condominium unit. Each year since purchasing their interest, Appellants have regularly paid the building's managing entity their annual assessed taxes on the property. Unfortunately, the majority of the interval owners of the building did not pay their assessed taxes. Rather than pay the tax collector part of the taxes owed on the building or advancing the sum on its own, the managing entity simply failed to pay the taxes assessed on the condominium building. As a result, the taxes on the building became delinquent.

The condominium association challenged the amount of the tax assessments on the building and deposited in escrow the

amount required by section 194.171, Florida Statutes. Included in the deposit were the taxes paid by the appellants. At the conclusion of the litigation, the tax collector applied the money held in escrow as partial payment for over one million dollars of delinquent taxes on the building. The condominium association objected on the basis that the tax collector had sold tax certificates on land on which the taxes had already been paid; the association demanded that the tax collector allocate the partial tax payments to the interval unit owners who paid their taxes so that their interests would not be sold in the event of a tax deed application. The tax collector refused.

Subsequently, Motel Management Company purchased the tax certificates and applied for a tax deed. To satisfy the tax certificates, the building must be sold at public sale. Threatened with the loss of their property interests, Appellants moved for a temporary injunction to bar the public sale until the trial court is able to conduct a hearing and rule upon their prayer for equitable relief. The trial court refused to issue the temporary injunction. Appellants instituted this appeal. We reverse.

Finding that appellants demonstrated a prima facie showing of irreparable harm from the impending loss of their property interests, an inadequate remedy at law, and a likelihood of probable success on the merits of their action, *Oxford Int'l Bank & Trust Ltd. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* 374 So.2d 54 (Fla. 3d DCA 1979), *cert. dismissed*, 383 So.2d 1199 (Fla. 1980); *see Parker Tampa Two, Inc. v. Somerset Dev. Corp.*, 544 So.2d 1018 (Fla. 1989), we hold that

the trial court abused its discretion in failing to issue a temporary injunction.

The equities of this case are such that the injunction should be issued without bond; however, Florida Rules of Civil Procedure 1.610(b) requires that a movant post bond before a temporary injunction may be issued. It would be inequitable to require appellants to post a bond in an amount commensurate with the value of the building when they own approximately a four thousandth interest in the property and have paid their proportionate share of taxes. Thus, we require appellants to post only a nominal bond for the issuance of a temporary injunction. Accordingly, we instruct the trial judge to issue the temporary injunction upon posting of a nominal bond.

Reversed and remanded with instructions.

IN THE CIRCUIT COURT OF
THE SIXTEENTH JUDICIAL
CIRCUIT IN AND FOR
MONROE COUNTY,
FLORIDA

CASE NO. 90-20-122-CA-18

GENE SOUTHARDS &
KATHLEEN SOUTHARDS,

Plaintiffs

vs.

MOTEL MANAGEMENT COMPANY
et al.,

Defendants.

_____/

SUMMARY FINAL JUDGMENT

THIS CAUSE came on to be heard on December 9, 1991, before the undersigned Judge upon motion for summary judgment filed by the Plaintiffs, and upon motion and amended motion for summary judgment filed by Defendants, Motel Management Company and the State of Florida, Department of Revenue. The Court has considered the pleadings and depositions on file, the memoranda filed by the parties, and the Agreed Statement of Facts. Upon the foregoing, and after argument of counsel, the Court makes the following findings and conclusions:

1. There is no genuine issue of material fact which is in dispute. The parties stipulated to this in the Agreed Statement of Facts and filed cross motions for summary judgment

predicated on the assumption the issues in this case were ripe for determination by summary judgment.

2. The Plaintiffs have previously been determined to be class action representatives of a group of fee simple owners of time-share condominium units at the Ocean 80 Resort in Monroe County, Florida. Typically, each owner has a fee simple interest to the exclusive use of one week in a designated unit at the resort, and owns an undivided interest in the remainder as a tenant-in-common with the other owners.

3. As provided by Section 192.037(1), F.S., for the purposes of ad valorem taxation, a managing entity was named for the time share property and is responsible for operating and maintaining the Ocean 80 Resort. The managing entity is considered the taxpayer for purposes of ad valorem taxation as the agent of each time share owner. For the period from 1984 through September, 1986, the managing entity was Holiday Interval Ownership, Inc. which was the developer. Since that time, the managing entity has been Ocean 80 Resort Owners Association, Inc., the unit owner's association.

4. In order to obtain the funds needed to operate the Ocean 80 Resort, during the years 1984 through 1987, the managing entity proposed a budget for the operation and maintenance of the time-share facility which was to be approved by the Board of Directors of the Ocean 80 Resort Owners Association, Inc. A copy of the proposed budget was approved to all unit owners. It scheduled all of the anticipated expenses, including the sums necessary to pay ad valorem taxes. Once the budget was adopted, each unit owner was

assessed a sum equal to his prorated share of the total necessary to fund all of the budgeted expenses. No separate bill or assessment for ad valorem taxes was sent to the unit owners, nor was it required to be sent under Florida's time-share statute.

5. In each year from 1984 through 1987, the managing entity failed to collect sufficient monies from unit owners either by assessments or special assessments to pay all of the budgeted expenses, including ad valorem taxes. For each year from 1984 through 1987, the managing entity used the monies collected from unit owners to pay operating expenses other than ad valorem taxes. For each year from 1984 through 1987, the managing entity failed to pay the tax collector the total amount due for ad valorem taxes. And for each year from 1984 through 1987, the managing entity failed to establish an escrow account for ad valorem taxes, as required by Section 192.037(6), F.S.

6. There are approximately 4,029 unit weeks in the Ocean 80 Resort. Of these, the Plaintiffs own 883 units, or 22% of the time-share units. The Plaintiffs are those unit owners who regularly paid the assessments billed by the managing entity for common expenses including ad valorem taxes for the years 1984 through 1988. The other unit owners failed to pay these assessments.

7. For each year from 1984 through 1987, pursuant to Section 192.037(2), F.S., the county tax assessor listed the Ocean 80 Resort property on the tax rolls as a single entry, and he assessed the value of the combined individuals time-share estates as the value of the resort for ad valorem tax purposes.

8. The managing entity filed suit in Monroe County Circuit Court contesting the ad valorem tax assessment for each year from 1984 through 1987. In each law suit, as required by Section 194.171(3), F.S., the managing entity paid the amount it admitted in good faith was owing as tax as a condition to maintaining the action. The amount paid for 1984 was $44,509.98; for 1985, it was $44,509.98; for 1986, it was $45,000; and for 1987, it was $45,000.

9. Shortly after the decision of the Supreme Court of Florida in Day v. High Point Condominium Resorts, Ltd., 521 So. 2d 1064 (Fla. 1988), determining Section 192.037, F.S., to be facially constitutional, this Court either dismissed the complaint or granted summary judgment in favor of the tax assessor and tax collector in each case.

10. Upon the termination of the tax protest law suits, the tax collector applied the good faith payments toward the taxes due and made demand upon the managing entity for the balance. The sums due were $116,672.27; less $44,509.98 paid as the amount deposited by the managing entity for 1984; $185,801.05, less $44,509.98 paid as the amount deposited by the managing entity for 1985; $200,489.07, less $45,000 paid as the amount deposited by the managing entity for 1986; and $211,586.07, less $45,000 paid as the amount deposited by the managing entity for 1987.

11. When the managing entity failed to pay the balance, the tax collector advertised and sold tax certificates for the tax years in question to Defendant, Motel Management Company, Inc. These tax certificates constitute a lien upon the real

property of the Ocean 80 Resort, including the time-share interest held by the Plaintiffs. Defendant Motel Management Company holds tax certificates totaling in excess of $1,600,000 (including the 1988 tax year). The Ocean 80 Resort property has been assessed by the tax assessor for a sum in excess of $10,000,000.

12. On April 1, 1990, Motel Management applied for a tax deed under the provisions of Section 197.502, F.S. Each tax certificate may be redeemed at any time prior to the issuance of such a deed. If they are not redeemed the Plaintiffs risk losing their time-share interest in the Ocean 80 Resort.

13. Section 192.037(3) F.S., requires the tax assessor to send a single ad valorem tax bill only to the managing entity. Section 192.037(7) requires the tax collector to accept only full payment of the ad valorem taxes assessed against a time-share development.

14. Plaintiffs attempted to directly pay the tax collector the amount of ad valorem tax they allege was due on their individual time-share property interest. The tax collector refused such payment.

15. The time-share statute does provide a remedy to time-share unit owners in the Plaintiffs' position. It grants the managing entity authority to obtain a money judgment or the right to both file and foreclose a lien upon the time-share interest of an owner who fails to pay an assessment. The managing entity in this case failed to do any of these things. The undisputed facts are that the managing entity used the amounts actually collected from unit owners to pay expenses of

operation of the time-share facility other than the ad valorem taxes.

16. Instead, the Plaintiffs brought this action for a declaratory judgment that Sections 192.037(2) and (7), F.S., are unconstitutional as applied and that the tax certificates held by Motel Management Company are void ab initio, and are unenforceable.

17. Plaintiffs contend the statute governing the assessment and collection of ad valorem taxes from time-share properties unconstitutionally deprives them of their property because they cannot free their individual time-share interest from the lien of a tax certificate despite having tendered their pro rata share of the tax assessment levied against the time-share property. Plaintiffs contend the statutory remedies afforded the managing entity to enforce payment of assessments are illusory because of the cost involved and the lack of purchasers for units retaken by the managing entity through foreclosure. There was no claim made in the Second Amended Complaint of unconstitutionality based upon a denial of equal protection; therefore, no strict scrutiny test is applicable to determine whether the statute is unconstitutional, as applied.

18. The deposition testimony of both Sandy Geisler, the former resort manager and secretary to the Board of Directors of Ocean 80 Resort, and Ronald Stern, the outside certified public accountant to the managing entity, clearly reflects there never was enough money collected to pay all the expenses of operation of the Ocean 80 Resort, and that the managing entity

simply chose to pay other costs of operation in order to continue operations rather than pay the ad valorem taxes.

19. The uncontradicted evidence further reflects that the managing entity never attempted to enforce its collection rights against the time-share property interests of unit owners who failed to pay assessments. At the time each owner acquired his interest, he was advised that the managing entity was named as his agent for purposes of proposing a budget, collecting money to pay operating costs (including taxes), and enforcing rights against non-performance owners.

20. Florida Statute Section 197.037 has already been determined to be constitutional on its face. Day, 521 So. 2d at 1066-67. It is also constitutional as applied. It satisfies the test used in determining whether an act is violative of the due process clause, that is, "whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive." Day, 521 So. 2d 1066-67.

21. The legislative objective in enacting Section 192.037, F.S., was to address the unique problem caused by subdividing a condominium unit into multiple time-share units. The legislature is allowed a very broad degree of latitude in this area. Day, supra. The Supreme Court of Florida has already determined the statute was enacted to address the administrative assessment and collection problems for taxing authorities caused by the fee time-share concept.

22. The statute clearly bears a reasonable relation to the permissible legislative objective of erecting an efficient

assessment and collection process in the face of a vast number of time-share owners of a single condominium unit. Any other arrangement would create wholesale disarray and impede the tax assessor and the tax collector in the performance of their jobs.

23. Finally, the statute is not discriminatory, arbitrary or oppressive. First of all, it treats fee time-share owners in the same manner as all other multiple ownership property owners; that is there is only one tax notice sent instead of a separate notice sent to each owner. Next, the statute provides a means of redress to the managing agent, as representative of time-share owners who have paid their assessments, as against those owners who have not paid. See Section 192.037(8), F.S. Further, Section 192.037(4), F.S., preserves all the rights and privileges with respect to contesting or appealing assessments afforded property owners generally by Chapter 194, F.S., to both the managing entity and to each time-share fee owner; and finally, Section 192,.037(9), F.S., gives time-share unit owners all of the protections available to other fee owners concerning application for a tax deed by the holder of a tax sale certificate. See §197.052, F.S.

24. The requirement of Section 194.17(3), F.S., that the tax collector receive from plaintiffs who contest tax assessments the amount admitted in good faith to be owing as ad valorem taxes as a condition precedent to maintaining a challenge of those taxes, and the requirement of Section 192.037(7), F.S., that the tax collector accept no less than full payment of the ad valorem taxes due from a time-share

development are not inconsistent, and are interpreted by the Court as capable of being harmonized as was done by the tax collector in this case.

25. Because the issues in this case are not identical to those addressed by the Court in the tax assessment disputes referred to in paragraphs 7 and 8 above, the defenses of issue preclusion, estoppel by judgment and res judicata are inapplicable.

Upon the foregoing, it is

ORDERED AND ADJUDGED AS FOLLOWS:

A. The Amended Motion for Summary Judgment of the State of Florida, Department of Revenue, and the Motion for Summary Judgment of the Defendant, Motel Management Corporation addressing both the constitutionality of Section 192.037, F.S., as applied, and the enforceability and status of the tax certificates are granted. The statute is constitutional as applied and the tax certificates are enforceable.

B. The Amended Motion for Summary Judgment of the Defendant, Motel Management Corporation addressed to the issue of res judicata, estoppel by judgment and issue preclusion is denied.

C. The Second Motion for Summary Judgment of the Plaintiffs is denied.

D. The Order Granting Motion for Temporary Injunction, dated October 23, 1990, is vacated.

E. The Court retains jurisdiction of this cause for the purpose of determining damages as a result of the injunction, and for the taxation of costs and fees, if any.

DONE AND ORDERED IN CHAMBERS, THIS 18 DAY OF FEB., 1992.

J. JEFFERSON OVERBY
Circuit Judge

IN THE DISTRICT COURT OF
APPEAL OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1993
JANUARY 26, 1993

GENE SOUTHARDS, et al.,

Appellants,

vs. CASE NO. 92-544

MOTEL MANAGEMENT COMPANY,
etc., et al.,

Appellees,

Upon consideration, appellants' motion for rehearing is hereby denied. Barkdull and Hubbart, JJ., concur. Ferguson, J., dissents. Appellants' motion for rehearing en banc is denied. Barkdull, Hubbart, Nesbitt, Baskin, Cope, Levy, Gersten and Goderich, JJ. concur. Schwartz, C.J., and Ferguson, J., dissent.

A True Copy

ATTEST:
LOUIS J. SPALLONE
Clerk District Court of
Appeal, Third District

BY:_____
Deputy Clerk

IN THE CIRCUIT COURT OF
THE SIXTEENTH JUDICIAL
CIRCUIT IN AND FOR
MONROE COUNTY,
FLORIDA

CASE NO 90-20-122-CA 18

GENE SOUTHARDS &
KATHLEEN SOUTHARDS

Plaintiffs

vs.

MOTEL MANAGEMENT COMPANY
et al.

Defendant

_____/

AGREED STATEMENT OF FACTS

Plaintiffs and Defendants stipulate that the following facts are undisputed and may be considered by the Court in ruling on motions for summary judgment:

1. The Plaintiffs seek a judgment declaring Section 192.037 (2) and (7), F.S., unconstitutional as applied to the Plaintiffs, and a judgment declaring tax certificates issued to Defendant, Motel Management Company, n/k/a B&M Management Company, Inc., for the tax years 1984, 1985, 1986, 1987, and 1988 void ab initio and unenforceable.

2. Plaintiffs are fee simple owners of one week of an interval ownership condominium unit at Ocean 80 Resort, which they purchased at $3,940, entitling them to occupy the unit on the 32nd week of each year. They own a remainder in

fee simple as tenants-in-common with the remaining 51 unit week owners.

3. Defendant, Harry F. Knight, is the tax collector of Monroe County, Florida (Tax Collector).

4. Defendant, J. Thomas Herndon, is the Executive Director of the Department of Revenue of the State of Florida.

5. Defendant, Motel Management Company n/k/a B&M Management Company, Inc. (Motel Management), is the holder of tax certificates for the ad valorem tax years 1984 through 1988 encumbering the property in question.

6. In light of the prior Order entered by the Court certifying Plaintiffs as class action representatives, no claims remain for trial concerning class action representation.

7. As provided by Section 192.037(1), F.S., the Managing Entity of the Ocean 80 Resort from 1984 through the turnover of control by the developer to the owners in September, 1986, was Holiday Interval Ownership, Inc. The Managing Entity subsequent to that time has been Ocean 80 Resort Owners Association, Inc. (Managing Entity). The developer of the resort was Holiday Interval Ownership, Inc.

8. Each year for the tax years at issue, the Managing Entity would propose a budget to be adopted by the Board of directors of Ocean 80 Resort Owners, Inc. Association. A copy of the proposed budget would be provided to all unit owners. The budget would include provision for all of the anticipated annual expenses, including items such as insurance, payroll, utilities and the ad valorem taxes. Once the budget was approved, each unit owner was assessed a sum of money equal

to his or her prorated share of the total sum necessary to fund each of the budgeted expense items, including a separate line item for the ad valorem tax. For each year from 1984 through 1988, the Managing Entity failed to collect sufficient sums from unit owners by assessments and by special assessments to pay the budgeted expenses, including ad valorem taxes. For each year from 1984 through 1988, the Managing Entity failed to pay the total amount due as ad valorem taxes. For each year from 1984 through 1988, the Managing Entity failed to establish a tax escrow account for the purpose of paying ad valorem taxes, as required by Section 192.037(6)(a), F.S.

9. There are approximately 4,029 unit weeks in the Ocean 80 Resort. Only 883 unit owners, the plaintiffs, regularly paid the assessments billed by the Managing Entity for the payment of common expenses during the period 1984 through 1988. This represents approximately 22% of the timeshare unit owners.

10. The Managing Entity filed suit in Monroe County, Florida, contesting the ad valorem tax assessment for 1984, under case number 84-20494-CA-13. By stipulation of the Managing Entity, the Tax Collector and Tax Assessor of Monroe County, Florida, that suit was consolidated with similar tax assessments suits filed by the Managing Entity for the tax years 1985 and 1986, under case numbers 86-20137-CA-16 and 87-20075-CA-18.

11. As required by Section 194.171(3), F.S., the Managing Entity paid to the Tax Collector the amount admitted in good faith to be owing as taxes for each of the tax years in

question as a condition to maintaining the assessment suits. The amount paid in 1984 was $44,509.98; the amount paid for 1985 was $44,509.98; the amount paid for 1986 was $45,000; and the amount paid for 1987 was $45,000.

12. On June 10, 1988, this Court entered an Order dismissing case numbers 86-20137-CA-16 and 87-20075-CA-18, on the basis of the Supreme Court of Florida's decision in Day v. High Point Condominium Resorts, Ltd., 521 So.2d 1064 (Fla. 1988), that Section 192.037 was facially constitutional. On August 29, 1988, this Court granted summary judgment in favor of the Tax Assessor and the Tax Collector in case no: 84-204941-CA-13, on the same basis.

13. At the conclusion of the tax assessment suits referred to above, the Tax Collector made demand on September 30, 1988, upon the Managing Entity for the taxes due in the following amounts: for 1984 the sum of $116,672.27, less $44,509.98 previously paid to the Tax Collector as the amount of tax admitted in good faith to be owing; and made demand on June 22, 1988, for 1985 the sum of $185,801.05 less $44,509.98 previously paid to the Tax Collector as the amount of tax admitted in good faith to be owing; for 1986 the sum of $200,489.07, less $45,000 previously paid to the Tax Collector as the amount of tax admitted in good faith to be owing; and for 1987 the sum of $211,586.07; less $45,000 previously paid to the Tax Collector as the amount of tax admitted in good faith to be owing.

14. Section 192.037, F.S., is the statutory scheme established for the assessment, collection and payment of ad valorem taxes on timeshare property.

15. Section 192.037(1) provides that the Managing Entity responsible for operating and maintaining the timeshare property "shall be considered the taxpayer as an agent of the timeshare period titleholder." Section 192.037(2) provides that the timeshare unit "shall be listed on the assessment rolls as a single entry." Section 197.032(3) obligates the Tax Assessor to send the ad valorem tax bill to the Managing Entity. It does not authorize the Tax Assessor to send a tax bill to the individual owners. The tax bills in question for the years 1984, 1985, 1986, 1987, and 1988 were sent to the Managing Entity.

16. Plaintiffs attempted to pay the Tax Collector the amount they alleged was due as ad valorem taxes on their individual timeshare unit. The Tax Collector refused to accept payment from the Plaintiffs on the ground that Section 192.037(7), F.S., required him to accept only full payment of the taxes due on the timeshare development.

17. Pursuant to Section 197.432, F.S., the Tax Collector offered for sale and Motel Management purchased tax certificates for unpaid taxes, less the amount previously paid to the Tax Collector as the "good faith" deposit pursuant to §194.171(3), on the Ocean 80 Resort for the tax years 1984, 1985, 1986, 1987, and 1988. The tax certificates constitute a lien upon the real property of Ocean 80 Resort, including the interest held by the Plaintiffs.

18. On April 1, 1990, Motel Management applied for a tax deed pursuant to the provisions of Section 197.502, F.S. If the tax certificates are enforceable as provided by law, the Plaintiffs are at risk of losing their fee simple interest in their timeshare unit weeks.

19. Motel Management holds tax certificates for 1984, 1985, 1986, 1987, and 1988, totaling over $1,600,000. The property has been assessed by the Tax Assessor for a sum in excess of $10,000,000. As provided by law, the tax certificates may be redeemed prior to the issuance of a tax deed.

20. The Managing Entity obtained a money judgment against the Developer for approximately $1,700,000 in 1989 which, despite the issuance of a Writ of Execution, has not been enforced. There is an alleged first mortgage encumbering all of the Developer units having an outstanding balance in excess of $4,000,000, but the validity and extent of this mortgage is disputed. Whether the Developer holds clear title to the Developer's units is also disputed.

21. The Managing Entity has not attempted to enforce any lien against the unit weeks of non-paying unit owners, although the statute governing timeshares provides for this remedy. Any interest the Managing Entity would have received in the unit weeks had it exercised its right to enforce a lien would have been subject to any existing mortgages and would have involved the costs of foreclosure.

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MONROE COUNTY, FLORIDA

CASE NO. 90-20-122-CA-18

GENE SOUTHARDS AND KATHLEEN SOUTHARDS, Husband and Wife,
Plaintiffs,

vs.

MOTEL MANAGEMENT COMPANY ,a Florida Corporation, and HARRY F. KNIGHT, Tax Collector, Monroe County, Florida,
Defendants.

PETITION SEEKING TEMPORARY INJUNCTION, DECLARATORY RELIEF, AND MANDATORY RELIEF

CLASS REPRESENTATION

The Petitioners, Gene Southards and Kathleen Southards, by and through their undersigned attorney, and pursuant to F.R.Civ.P. 1.220, bring this action on behalf of themselves and all others similarly situated and, in support thereof, state:

JURISDICTION

1. This is an action for equitable relief or, in the alternative, damages in excess of $5000.00.

PARTIES

2. The Plaintiffs are fee simple owners of interval ownership condominium unit at Ocean 80 Resort, a condominium, pursuant to the Declaration of Condominium thereof, as recorded in Official Records Book 849 at Page 474 in the Public Records of Monroe County, Florida, (hereinafter the "Resort") who have paid their ad valorem taxes in

accordance with the provisions of Section 192.037, Florida Statures, each year since purchasing their units, including 1984, 1985, 1986, 1987 and 1988.

3. The Defendant, Harry F. Knight (hereinafter "Knight"), is the Tax Collector, Monroe County, Florida.

4. The Defendant, Motel Management Company, n/k/a B&M Management Company, Inc., (hereinafter "Motel"), is a Florida Corporation doing business in Monroe County, Florida.

5. Class Representation Allegations:

A. This claim is made pursuant to Rule 1.220(b)(2) of the Florida Rules of Civil Procedure.

B. The questions of law and fact that are common to the claim of the representative parties and the claim of each member of the class are the following:

(1) Whether Motel should be required to transfer certain tax certificates which encumber the Resort to Ocean 80, Inc., if Motel is paid the full amount to which it is otherwise entitled if the certificates were redeemed pursuant to Section 197.472, Florida Statutes.

(2) Whether the provisions of Section 192.037, Florida Statutes, are unconstitutional as applied to Plaintiffs and other members of the Class in that its application results in an unlawful taking of Plaintiffs' real property interest by government without due process of law, contrary to Article I, Section 2, Florida Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution.

(3) Whether the tax certificates issued by Knight for the years 1984, 1985, 1986 and 1987 which

encumber the Resort, including that portion thereof owned by Plaintiff and the Class, are void because Knight applied escrowed funds which he had accepted from the Association as a partial payment of ad valorem taxes (hereinafter referred to as "taxes") in violation of the provisions of Section 192.037(7), Florida Statutes.

C. The Plaintiffs and each member of the Class are owners of fee time share units, the tangible personal property of such units and a representative percentage share of the common elements, in a certain condominium development known as Ocean 80 Resort, a Condominium, whose aforesaid units have been assessed for taxes by Knight.

D. Specific recitations regarding the Class are:

(1) There are approximately 883 persons in this Class.

(2) Each member of this Class has paid in full all ad valorem taxes due and owing from them to the managing entity, in accordance with Section 192.037(5), Florida Statutes.

(3) Plaintiffs will fairly and adequately protect and represent the interests of each member of the Class because the Plaintiffs seek to protect each member of the Class from defeasance of their respective property interest. By doing so, the findings of fact and conclusions of law will fairly and adequately protect and represent the interest of each member of the Class.

E. The rights of the Plaintiffs and the Class to protect their property against loss without due process of law in this case are inseparable. The property of each member of this

Class, together with the property of the Plaintiffs, is in immediate jeopardy of loss due to the application and effect of Sections 192.037(7) and 197.502, Florida Statutes. Further, Section 197.472, Florida Statutes, should be construed to require the holder of tax certificates to transfer ownership of the tax certificates, upon demand and the tender of their face value plus accrued interest, to owners of the encumbered property, their agents or assigns.

FACTS

Facts upon which Plaintiffs are entitled to relief:

6. The managing entity of the Resort is the Ocean 80 Resort Owners Association, Inc. (hereafter the "Association").

7. The Developer of the Resort was Holiday Interval Ownership, Inc. (hereafter the "Developer").

8. Until 1986, the Developer controlled and ran the Association, collected the ad valorem taxes, but failed to pay the taxes as required by Chapter 192, Florida Statutes.

9. Section 192.037, Florida Statutes, is the general taxation provisions for ad valorem taxes (hereinafter "taxes") as applied to fee time-share real property. This statute creates unique and different methods of dealing with the collection and payment of taxes for time-share property.

10. Section 192.037(1), Florida Statutes, makes the managing entity (the Association) the agent of each time-share period fee titleholder.

11. Section 192.037(5), Florida Statutes, required the managing entity to collect the taxes from each time-share period titleholder and to remit these taxes to the tax collector.

12. Section 192.037(7), Florida Statutes, prohibits the tax collector from accepting less than full payment of the entire amount of the assessed taxes due on any time-share development.

13. Although Section 192.037(8), Florida Statutes, gives the managing entity a lien on the time-share periods which do not pay their portion of the taxes, it is as expensive and time consuming to foreclose such a lien as it is to foreclose any other type lien on real property in the State of Florida. Additionally, because of the small per unit value of a time-share there is no guarantee that anyone will bid on a time-share unit week or that the proceeds of the sale would be sufficient to pay the costs of foreclosure. Therefore, the statutory remedy afforded the Association in Section 192.037(8), Florida Statutes, is no remedy at all for the individual unit owners.

14. At the Resort, there are only 883 unit owners who have regularly paid their assessed taxes. There are 4029 unit weeks which should be paying taxes.

15. As a result of the nonpayment of taxes by the remaining 3146 unit owners, those unit owners who have paid their taxes are faced with no remedy other than the payment of the tax for those 3146 who refuse to pay.

16. Because the Association was not successful in the collection of taxes from each and every unit owner during the years 1984, 1985. 1986, 1987, and 1988, there was <u>never</u> enough money to pay the taxes, in full, for any of the aforementioned years.

17. The unit owners who had paid their taxes as assessed in each of the aforementioned years were precluded from paying Knight directly and from paying Knight the amount actually collected if less than the full amount. Thus, they were statutorily precluded from paying their taxes in any manner.

18. The amount of the tax assessments for the Resort was challenged in the years 1984, 1985, 1986, and 1987. As required by Section 194.171, Florida Statutes, the following amounts were placed into escrow with the Tax Collector for each of the following years:

a.	1984	-	$44,509.98
b.	1985	-	$44,509.98
c.	1986	-	$45,000.00
d.	1987	-	$45,000.00

19. On June 22, 1988, the office of Knight notified the Association, through the Developer, that it was applying as partial payment the monies held by Knight in escrow in relation to lawsuits for the years 1985, 1986, and 1987. (See letter attached hereto and incorporated herein as Exhibit 1.)

20. On September 30, 1988, the office of Knight notified the Association, through the Developer, that it was applying as partial payment the monies held by Knight in escrow in relation to a lawsuit filed for the year 1984. (See letter attached hereto and incorporated herein as Exhibit 2.)

21. Pursuant to Section 192.037(7), Florida Statutes, Knight is prohibited from accepting partial payment of taxes due on any time-share development.

22. If the Plaintiffs do not redeem the tax certificates, they will face the loss of their units even though the Plaintiffs and all the members of the Class have already paid the taxes on their units.

23. Motel has announced its intent to make application, on or about April 1, 1990, to obtain a tax deed for the aforedescribed tax certificates, pursuant to Section 197.502, Florida Statutes, which, in effect, would cause the Resort, including the property interest of Plaintiffs and all members of the Class, to be publicly auctioned.

24. The value of the Resort is approximately $10,000,000. The face value of the tax certificates held by Motel's is less than $1,000,000,00.

25. Neither Plaintiffs nor the Association have the funds to redeem the certificates as provided for in Section 197.472, Florida Statutes.

26. If the Plaintiffs or the Association had the funds to redeem the certificates, Motel would only be entitled to receive an amount equal to its initial investment together with the accrued interest thereon at 18% for the certificates issued for 1984, 1985, 1986 and 1987.

27. Plaintiffs, through the Association, are in need of substantial funding to do such things as collect and pay the outstanding taxes, foreclose on the liens which the Association has on those units which have not paid their taxes, make repairs, pay for litigation and fund numerous other projects.

28. Ocean 80, Inc., a management company hired by the Association, has found a lender who is willing to loan the sum

of $2.8 million to Ocean 80, Inc. to do the projects set forth in the preceding paragraph. However, the third party lender will not make the loan unless the loan can be secured. The only security acceptable to the lender is to have the aforedescribed tax certificates pledged as collateral.

29. Ocean 80, Inc. has attempted to have Motel transfer said tax certificates to Ocean 80, Inc. by offering to pay Motel the redemption value of the certificates, including interest, as provided for in Section 197.472, Florida Statutes.

30. Motel has refused to transfer ownership of the certificates unless Ocean 80, Inc. pays Motel $500,000.00 in excess of the redemption value.

31. The third party lender has refused to make the loan if Ocean 80, Inc. pays $500,000.00 above the redemption value to Motel because to do so, in the opinion of the lender, would demonstrate bad fiscal management on the part of Ocean 80, Inc.

32. Because they have no individual remedy against those who do not pay their taxes, Plaintiffs and all other members of the Class have no alternative but to help the Association obtain the loan through Ocean 80, Inc. and to bring the subject litigation.

COUNT I - TEMPORARY INJUNCTIVE RELIEF

33. Plaintiffs adopt and re-allege the allegations contained in Paragraphs 1 through 32 as if set forth fully herein.

34. Plaintiffs have no adequate remedy under the law and will suffer irreparable injury unless a temporary injunction issues.

35. Plaintiffs and all other members of the Class are in need of a temporary injunction to restrain Knight from accepting and/or processing an application, as provided for in Section 197.502, Florida Statutes, from Motel, or any other party, for tax deed on Resort until such time as the Court is able to determine the merits of Plaintiffs' petitions for declaratory relief.

36. No bond should be required of Plaintiffs because of the following:

A. Ocean 80, Inc. is willing to immediately buy the certificates at their full value, including all accrued interest thereon.

B. If for some reason Ocean 80, Inc. is unable to immediately buy the certificates, no possible damage can accrue to Motel because Motel will continue to draw interest on the certificates at 18% (13% for the 1988 tax certificate). The appraised value of Resort is approximately ten million dollars and the approximate value of the tax certificates is one million dollars, including interest.

C. Knight has no financial interest whatsoever in the certificates in that Knight has already received full payment from Motel for any tax liability associated with Resort for the years encompassed by the certificates.

37. If the tax deed is applied for, it will result in the eventual sale of the property of Plaintiffs and all members of the Class for which there will be no adequate remedy at law, and Plaintiffs and all members of the Class will suffer irreparable injury. Plaintiffs have a clear legal right to retain

the property for which they have paid their taxes and it is in the public interest to assure people that their property will not be taken when they pay their taxes.

WHEREFORE, Plaintiffs and all members of the Class pray for the entry of a temporary injunction, without bond, restraining Knight from accepting and/or processing an application for tax deed as provided for in Section 197.502, Florida Statutes.

COUNT II - DECLARATORY RELIEF

39. Plaintiffs adopt and re-allege all allegations contained in Paragraphs 1 through 32 as if set forth fully herein.

40. This is a petition for declaratory judgment pursuant to Chapter 86, Florida Statutes.

41. Plaintiffs are in doubt as to the validity of Section 192.037(7), Florida Statutes, and Plaintiffs' property rights have been invaded and have been adversely affected by the application of said Statute.

42. As applied to the Plaintiffs and all other members of the Class, Section 192.037(7), Florida Statutes, will result in an unconstitutional taking of their property interests without due process of law as protected by Article I, Section 2, of the Florida Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution. They have paid their taxes as they have been directed by statute for the years 1984 through 1989, inclusive. They are prohibited by this statute from any other method of payment, and yet they face the imminent loss of their property due to tax delinquencies caused by others.

43. Plaintiffs and all other members of the Class have property rights which are adversely affected by Section 192.037(7), Florida Statutes, as applied to them and therefore are in need of this Court to construe the constitutionality of said statute.

44. Plaintiffs and all other members of the Class have no other remedy at law.

WHEREFORE, Plaintiffs pray for the entry of an Order declaring Section 192.037(7), Florida Statutes, unconstitutional and enjoining its enforcement as applied to Plaintiffs and all other members of the Class.

COUNT III - DECLARATORY RELIEF

45. Plaintiffs adopt and re-allege Paragraphs 1 through 32, 40, and 44, as if fully set forth herein.

46. The tax certificates issued for the years 1984, 1985, 1986 and 1987, which encompasses the entirety of Resort, are void because Knight accepted partial payment of property taxes from the Association (some or all of which taxes were paid by Plaintiffs and all other members of the Class). The tax certificates fail to exclude the units owned by the Plaintiffs and all other members of the Class and are void because their issuance was in violation of Section 192.037(7), Florida Statutes, and will result in an unconstitutional taking in violation of Article I, Section 2, of the Florida Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution.

47. Plaintiffs are in doubt as to the validity of aforesaid tax certificates and Plaintiffs' property rights have been invaded and have been adversely affected by said certificates.

WHEREFORE, Plaintiffs pray for the entry of an Order declaring the tax certificates encumbering the Resort issued by Knight for the years 1984, 1985, 1986, and 1987 void as being illegally and unconstitutionally issued.

COUNT IV - MANDATORY INJUNCTIVE RELIEF

48. This is an action for mandatory injunctive relief.

49. Plaintiffs adopt and re-allege Paragraphs 1-32, 36 and 37.

50. Plaintiffs have no adequate remedy under the law and will suffer irreparable injury unless a mandatory injunction issues which requires Motel to transfer the tax certificates which encumber Resort for the years 11984, 1985, 1986 and 1987 to Ocean 80, Inc.

WHEREFORE, Plaintiffs pray for the entry of an Order granting a mandatory injunction requiring Motel to transfer the tax certificates which encumber Resort for the years 1984, 1985, 1986 and 1987 to Ocean 80, Inc.

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MONROE COUNTY, FLORIDA

CASE NO. 90-20-122-CA-04

GENE SOUTHARDS AND
KATHLEEN SOUTHARDS,
Husband and Wife,

Plaintiffs,

vs.

MOTEL MANAGEMENT COMPANY, n/k/a B & M. Management Company, Inc., a Florida Corporation, and HARRY F. KNIGHT, Tax Collector, Monroe County, Florida,

Defendants.
_____/

MEMORANDUM OF LAW TO SUPPORT PLAINTIFFS' PETITION FOR TEMPORARY INJUNCTION

It is well established that, when a mandatory or permanent injunctive proceeding, declaratory action or other proceeding in equity would move too slowly to prevent imminent injury, the court may grant a temporary injunction to preserve the status quo until the merits of the entire case may reach a final hearing. *Adoption Hotline, Inc. vs. State*, 385 So.2d 682, 684 (Fla. 3d DCA 1980); *Ladner vs. Plaza del Prado Condominium Association, Inc.*, 423 So.2d 927, 929 (Fla. 3d DCA 1982). The courts have defined the status quo so preserved as "the last peaceable non-contested condition that preceded the controversy. "Bailey *vs. Christo*, 453 So.2d 1134, 1137 (Fla. 1st DCA 1984). Such preservation of the state of affairs is the

"critical purpose" of a temporary injunction so that the movant "will not be forced to seek redress for damages after they have occurred." *Id.*

In establishing the burden of proof necessary to prevail, the courts have uniformly held that a movant seeking a temporary injunction must prove that:

1. He will suffer irrevocable harm unless the status quo is maintained.

2. He has no adequate remedy at law.

3. He has a clear legal right to the relief requested.

4. A temporary injunction will not be adverse to the public interest.

Hotelerama Associates, Ltd. vs. Bystrom, 449 So.2d 836, 838-39 (Fla. 3d DCA 1984).

Whether or not a temporary injunction issues is within the sound discretion of the court, applying the principals of equity common to injunctive relief in general. *Decumbe vs. Smith*, 143 Fla. 5, 196 So. 595 (Fla. 1940). Equity will not ordinarily intervene where law affords a full and complete remedy. *O'Donnall vs. Novak*, 183 So.2d 884, 886 (Fla. 3d DCA 1966). One who seeks equity, must do equity and come to the court with clean hands. *Ohmes vs. Ohmes*, 200 So.2d 849, 856 (Fla. 2d DCA 1963). The court will issue relief only when the petitioner can make a showing that there is a reasonable probability that the injury complained of will be sustained. *Paul's Drugs, Inc.. vs. Southern Bell Telephone and Telegraph Company*, 175 So.2d 203 (Fla. 3d DCA 1965). No one will be

enriched at the expense of another. *Gulf Shore Dredging Co. vs. Ingram*, 193 So.2d 232 (Fla. 1966).

In the present case, Plaintiffs and all class members face the eminent loss of their property interests. Defendant Motel, owner of the tax certificates which encumber Plaintiffs' property, has announced its intent to apply on or about April 2, 1990, for a tax deed pursuant to the provisions of Section 192.502, Florida Statutes. Said application by Defendant Motel will result in a public sale of Ocean 80 Resort to satisfy the tax lien under Section 192.542, Florida Statutes, within as little as forty days. Such an abbreviated time frame will not allow Plaintiffs a full and final hearing as to the merits of their petitions for Declaratory Judgments and Mandatory Injunctive Relief since the questions of law and fact are complex and may be of first impression in this state. The Plaintiffs' requested Temporary Injunctive Relief, that the Court restrain Defendant Knight from accepting and/or processing an application for tax deed from Defendant Motel, is, in effect, an attempt by Plaintiffs to "freeze" the state of affairs which directly precedes the complete and total defeasance of Plaintiffs' property interest.

If the statutory scheme under Chapter 197, Florida Statutes, is allowed to follow its normal, rapid course, Plaintiffs will be unable to avail themselves of the mandatory injunction prayed for in Count IV of their Complaint, since an injunction will not lie where an act, sought to be prevented, has already occurred. *Quadomin Condominium Association, Inc. vs. Pomerantz*, 341 So.2d 1041, 1042 (Fla. 4th DCA 1977). Further, their Petitions

for Declaratory Judgments as to the constitutionality of Section 192.037(7), Florida Statutes, as applied to them and the class members, and the invalidity of the tax certificates issued by Defendant Knight will be moot.

The allegations set forth in Plaintiffs' Complaint coupled with testimony to be adduced at the April 4, 1990, hearing are sufficient to entitle them to temporary injunctive relief:

1. IRREPARABLE HARM UNLESS STATUS QUO IS MAINTAINED:

Absent a temporary injunction, Plaintiffs and class members will be divested of their property interests. Defendant Motel has announced his intent to apply for a tax deed from Defendant Knight. Defendant Knight, under Chapter 197, Florida Statutes, will have the Monroe County Clerk sell Ocean 80 Resort at public auction. Under Section 197.562, Florida Statutes, the grantee of a tax deed resultant from that sale will be entitled to immediate possession of Plaintiffs' property and such title will be indefeasible as to Plaintiffs. *City of Sanford vs. Dial*, 104 Fla. 1, 142 So. 233 (Fla. 1932).

2. NO ADEQUATE REMEDY AT LAW: Plaintiffs have paid their taxes in full, each year, in accord with Section 192.037(7), Florida Statutes. Defendant Knight has accepted payment of taxes in excess of Plaintiffs' taxes for years 1984 through 1987. Notwithstanding full compliance with the law, Plaintiffs face imminent loss of their property because of tax delinquency. The remedies provided by law, redemption under Section 197.472, Florida Statutes, or purchase at public sale

under Section 197.542, Florida Statues, are inadequate as to Plaintiffs in that they have already paid their taxes and are being treated by the statutory scheme of Chapter 192, Florida Statutes, as those persons whose taxes are delinquent. In effect, they are required to pay their own taxes as well as the taxes of those who chose not to pay them. In order to preserve their property right worth several thousands of dollars, the Plaintiffs remedy, at law, is to pay in excess of one million dollars in delinquent taxes. This remedy at law is no remedy at all.

3. A CLEAR LEGAL RIGHT TO THE RELIEF REQUESTED: The Plaintiffs come to the Court seeking a temporary injunction with "clean hands." They have been caught in a statutory "catch 22" which has been created by the provisions of Chapters 192 and 197, Florida Statutes. There is a substantial likelihood that they will meet with success when the Court examines the merits of this case, in view of the illegal actions of Defendant Knight in selling tax certificates on land upon which the taxes have been paid. Section 197.442, Florida Statutes. Further, the unconstitutionality of Section 192.037, Florida Statutes, as applied to Plaintiffs and members of the Class is manifest in that it deprives Plaintiffs and class members alike of their property interest without remedy at law or due process in violation of Article 1, Section 2 of the Florida Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. *Reinhold Construction, Inc. vs. City Counsel for City of Vero Beach*, 429 So.2d 699 (Fla. 4th DCA 1983).

4. PUBLIC INTEREST CONSIDERATIONS: The public perception that an individual may be deprived of his property interest without due process and without remedy at law would result in confusion, disorder and injury to the public outweighing any individual right to relief. In the present case, issuance of the Temporary Injunction will serve the public interest in that the question of private ownership of property and its defeasance by the State without recourse by an individual, must be resolved by the Court. Any ambiguity in such a fundamental concept must be eliminated before it results in further disenfranchisement of private property rights.

Defendant Knight will suffer no damages because of the temporary Injunction, in that he has already been paid the full amount of the taxes due as compensation for issuance of the tax certificates. Defendant Motel will continue to receive interest set forth by statute on its investments. The public perception of the inviolate nature of property interests under our system of government will remain intact. *Sadowski vs. Shevin*, 351 So.2d 44 (Fla. 3d DCA 1976), *rev'd on other grounds*, 345 So.2d 330 (Fla. 1977).

CONCLUSION

In exercising the wide judicial discretion which rests upon the trial court in granting a temporary injunction, a review of the applicable case law and principals of equity indicate that Plaintiffs have set forth sufficient allegations and evidence that a temporary injunction against Defendant Knight should issue and that issuance of such a temporary injunction will serve the public interest.

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MONROE COUNTY, FLORIDA

CASE NO. 90-20-122-CA-18

GENE SOUTHARDS AND
KATHLEEN SOUTHARDS,
Husband and Wife,

Plaintiffs,

vs.

MOTEL MANAGEMENT COMPANY,
n/k/a B & M Management Company,
Inc., et al,

Defendants.
_____/

PLAINTIFFS' SECOND MOTION FOR SUMMARY JUDGMENT

Plaintiffs, Gene Southards and Kathleen Southards, husband and wife, and all other members of the Class, by and through their undersigned attorney, and pursuant to Florida Rule of Civil Procedure 1.510, file this their Second Motion for Summary Judgment. In support thereof, Plaintiffs state:

1. Plaintiffs, Gene Southards and Kathleen Southards filed a Second Amended Petition in their Class action seeking mandatory and injunctive relief on March 6, 1991.

2. The discovery has proceeded in this cause and clearly shows that there is no genuine issue as to any material fact to be decided.

3. The facts in this cause support Plaintiffs' Second Motion for Summary Judgment, based upon the following:

a) The findings of facts and statements of law set forth as the law of the case in *Southards v. Motel Management Company*, 567 So.2d 523 (Fla. 3d DCA).

b) The Agreed Statement of Facts stipulated to by the parties and attached hereto as Exhibit A.

c) Plaintiffs have paid their ad valorem taxes in accordance with the provisions of Section 192.037, Florida Statutes, each year since purchasing their units, including 1984, 1985, 1986, 1987, and 1988. Deposition of Kathleen Southards, pages 5 and 29, attached hereto as Exhibit B.

d) On June 22, 1988, Defendant Harry F. Knight (hereinafter the "Tax Collector") notified the Ocean 80 Resort Homeowners Association, Inc. (hereinafter the "Association") through the Developer, that it was applying as partial payment, the monies held by the Tax Collector in escrow in relation to lawsuits for tax years 1985, 1986, and 1987. On September 30, 1988, the Tax Collector notified the Association, through the Developer, that it was applying, as partial payment, the monies held by the tax collector in escrow in relation to a lawsuit filed for tax year 1984. Deposition of Harry F. Knight, pages 6 to 8 and 32 to 34, attached hereto as Exhibit C.

e) Pursuant to Section 197.442, Florida Statutes, the Association, by letter dated September 19, 1988 from its attorney John A. Ritter, notified the Tax Collector that he had sold tax certificates on property on which taxes had already been paid. The Association demanded that the Tax Collector allocate

the aforedescribed partial tax payments to the specific time-share owners who paid their taxes in order that their unit weeks would not be sold in the event of a tax deed application. The Tax Collector refused. *Southards v. Motel Management*, 567 So.2d 523, 524; and the deposition of Ronald Stern, pages 58 to 60 and Defendant's Composite Exhibit G, attached hereto as Exhibit D.

COUNT I - TEMPORARY INJUNCTIVE RELIEF

4. Pursuant to the holding of the Court in *Southards v. Motel Management Co.*, 567 So.2d 523 (Fla. 3d DCA 1990), this Court, on October 23, 1990, found that the Plaintiffs had demonstrated a *prima facie* showing of irreparable harm from the impending loss of their property interests, an inadequate remedy at law, and a likelihood of probable success on the merits of their action, and granted Plaintiffs' Motion for Temporary Injunction. This injunction prevented the Tax Collector from further processing and proceeding on the application for tax deed from Motel Management and the sale of Ocean 80 Resort (hereinafter the "Resort") at public auction, during the pendency of this litigation.

COUNT II - DECLARATORY RELIEF: PLAINTIFFS' PROPERTY RIGHTS HAVE BEEN VIOLATED

5. Plaintiffs are in doubt as to the validity of Sections 192.037(2) and (7), Florida Statutes, in that Plaintiffs' right to acquire, possess, and protect their property has been invaded and has been adversely affected by the application of said statutory provisions. Plaintiffs' property rights are basic to the foundation of our democratic system of government and have

been characterized as a sacred right, the protection of which is an important object of government. The right to acquire and own property, as set forth in Article I, Section II, Constitution of Florida, and the Fifth and Fourteenth Amendments to the United States Constitution, are *fundamental rights* which are a part of the Plaintiffs' natural liberty, guaranteed as inviolate to every American. *Corn v. State,* 332 So.2d 4, 7 (Fla. 1976).

6. In the present case, the application to Plaintiffs of Section 192.037(2) and (7) Florida Statutes, will ultimately result in the defeasance of their time-share property interest even though they have complied with said statute and paid their taxes. It is well established that, when the legislature creates a property interest, such property rights should be protected and enforced by due process of law. *City of Winter Haven v. A.M. Klemm and Son,* 132 Fla. 334, 181 So. 153, 164 (1938). The right to acquire, posses, and protect property, secured against unlawful divestment by State action, is fundamental. *Corn v. State, supra.*; Article I, Section II, Constitution of Florida, Fifth and Fourteenth Amendment, United States Constitution. The State is without the right to deprive Plaintiffs of their fundamental property rights without due process of law or to treat them differently as a class with relation to their fundamental property rights without demonstrating a compelling State interest or meeting the measure of the strict scrutiny test. *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *Florida High School Activities Association, Inc., v. Thomas,* 434

So.2d 306, 308, (Fla. 1983); *Kinner v. State,* 382 So.2d 756, 760 (Fla. 2d DCA 1980).

When the legislature enacted Section 192.037(2) and (7), it intended to minimize the burden which time-share ownership would create for the Tax Collectors of the State of Florida. *Day v. Highpoint Condominium Resorts, Ltd.*, 521 So.2d 1064, 1065-66 (Fla. 1988). To achieve this goal, it created a special class of real property taxpayers: the time-share unit week property owner. The Plaintiffs are a member of that Class.

In order to meet the constitutional test to validate the creation of such a special class, it was only necessary for there to be a "rational basis" for such a classification. Since *facially*, the statute did not violate any fundamental rights, it met this test as applied by the Court in *Day*.

When one evaluates the *application* of this statute under the facts of this case, it is obvious and apparent that it unconstitutionally jeopardizes the fundamental property rights of the Plaintiffs. Here, the burden goes beyond the "rational basis" test and rises to the test of "strict scrutiny." *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), and *Florida High School Activities Association, Inc. v. Thomas,* 434 So.2d 306, 308.

To apply the strict scrutiny analysis to the facts of the present case, the Court must carefully examine the interest claimed by the State to justify the special classification set up in Section 192.037. In order to determine whether that interest is substantial and compelling, it requires the Court to inquire as to whether the means adopted to achieve the legislative goal are

necessarily and precisely drawn. *Re: The Estate of Greenberg*, 390 So.2d 40, 42 (Fla. 1980). The application of this test by the Court is almost always fatal to the statutory provision under such scrutiny. *Id* at 42-43.

The need for tax collection efficiency cannot overcome the constitutional protections which guarantee the Plaintiffs the fundamental rights to acquire, possess and protect their property. The economy of effort of the Tax Collector can be achieved without preventing individual owners from payment of their taxes directly to the Tax Collector when the statutory scheme otherwise fails. See, e.g., Cal. Property Taxation Code, Sections 2188.8 and 2188.9 (1990) (separate tax assessments and tax billings for time-share estates). This argument becomes more compelling when one realizes that the increase in assessed value of the time-share unit above its value as a simple condominium more than justifies the small pecuniary costs which the Tax Collector would incur by sending out individual notices to each time-share owner. Currently, the Tax Collector estimates that the costs of generating and mailing property tax bills to each property owner in Monroe County is approximately $7.00. See deposition of Harry F. Knight, page 28, attached hereto as Exhibit C.

7. As applied to Plaintiffs, the *application* of Section 192.037(2) and (7), fails to meet the "strict scrutiny" test and, therefore, the legislative rationale fails and the statutes must be held to be unconstitutional in that it violates the fundamental property rights of the Plaintiffs. *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969).

8. The Plaintiffs have paid their taxes as they have been directed by statute for the years 1984 through 1989, inclusive. They are prohibited by the statutory scheme set forth in 192.037(2) and (7) from any other method of payment. The taxes paid by the Plaintiffs to the managing entity have already been paid to the Tax Collector. Notwithstanding this fact, Plaintiffs still face the imminent loss of their property due to tax delinquency. Because of this dilemma caused by the *application* of Sections 192.037(2)(7), the Plaintiffs and all other members of the Class are in need of this Court to construe the constitutionality of said statutory provisions.

9. Plaintiffs and all other members of the Class have no other remedy at law.

10. Plaintiffs and all other members of the Class are entitled, as a matter of law, to an Order by this Court declaring Sections 192.037(2) and (7), Florida Statutes, unconstitutional and enjoining their enforcement as applied to Plaintiffs and all other members of the Class.

COUNT III - DECLARATORY RELIEF: THE TAX CERTIFICATES ARE VOID AB INITIO

11. It is undisputed that the managing entity challenged the amount of tax assessments on the Resort for years 1984, 1985, 1986, and 1987. For those tax years, the managing entity deposited in escrow with the Tax Collector the amount of $178,509.98 as required by Section 194.171, Florida Statutes. Included in that payment were taxes paid by the Plaintiffs. *Southards v. Motel Management Co.*, 523 So.2d at 524.

12. It is also undisputed that, at the conclusion of the litigation, the Tax Collector applied the money held in escrow as partial payment for over $1,000,000.00 of delinquent taxes on the Resort. *Id.*

13. It is undisputed that the tax certificates sold to Motel Management for the years 1984, 1985, 1986, 1987, which encompass the entirety of the Resort, failed to exclude the units owned by Plaintiffs and all other members of the Class, even though the Tax Collector has accepted their partial payment and reduced the amount of taxes due and owning on the Resort by subtracting that partial payment. *Id.*

14. In Florida, time-share property interests, like condominium property interest, are creatures of statute. They are subject to the control and the regulation of the legislature. *Century Village, Inc. v. Wellington*, 361 So.2d 128, 133 (Fla. 1978). To provide protection to the buyer of such a legislatively created property interest, the statutory provisions establishing and regulating that property interest must be strictly constructed to "assure these investors that what the buyer sees the buyer gets." *Sterling Village Condominium, Inc. v. Breitenbach*, 251 So.2d 685, 688 (Fla. 4th DCA 1971).

15. It is the duty of the Court to construe tax statutes in favor of taxpayers where an ambiguity may exist. *Harbor Ventures, Inc. v. Hutches*, 366 So.2d 1173, 1174 (Fla. 1979).

16. The tax certificates issued by the Tax Collector and purchased by Motel Management, are void *ab initio* because their issuance was in direct violation of Section 192.037 (7), Florida Statutes. Strict construction of that provision is required

by Florida law to protect the Plaintiffs and the other members of the Class from an unfair result. Any ambiguity created by a conflict between the provision of Section 194.171(3), Florida Statutes, and Section 192.037(7), Florida Statutes, must be resolved in favor of the Plaintiffs/Taxpayers.

The Tax Collector would "have his cake and eat it too." The Tax Collector would ignore the requirement of Section 192.037(7) in taking partial payment from the managing entity of the delinquent ad valorem taxes. Conversely, the Tax Collector would enforce the requirement of Section 192.037(7), by refusing to allow the Plaintiffs to pay him directly so as to prevent the imminent loss of their property interest. It is essential for the Court to note that Section 197.373, Florida Statutes, establishes just such a remedy for payment of a portion of ad valorem property taxes with regard to other, non-time-share, forms of real property ownership in the State of Florida.

By his violation of the clear mandate of Section 192.037(7), the Tax Collector will damage the Plaintiffs and the other members of the Class through the imminent loss of their property rights, the very parties for whom the legislature enacted the protective procedures set forth in Chapter 192, Florida Statutes.

17. It has long been held in Florida that the sale of real property at public auction for tax deficiencies where taxes have already been paid is against public policy and it unlawful. *Conant v. Buesing*, 23 Fla. 559, So.2d. 882, 884 (1987); *Garner v. Larkin*, 132 So.2d 298, 299 (Fla. 2d DCA 1961). Since

Plaintiffs have paid their taxes, the tax certificates as to their property interests are void *ab initio*.

18. Plaintiffs are entitled, as a matter of law, to an Order by this Court declaring the tax certificates encumbering the Resort issued by the Tax Collector for the years 1984, 1985, 1986, and 1987, void *ab initio* as being illegally and unconstitutionally issued.

THE LAW OF THE CASE: DAY V. HIGHPOINT IS NOT CONTROLLING

19. On September 25, 1990, the Third District Court of Appeal granted Plaintiffs' petition and directed the Trial Court to issue the temporary injunction referred to in paragraph 4 above. In opposing the issuance of that injunction, the Tax Collector argued to the Third District Court of Appeal, both in the brief of Appellee (attached hereto as Exhibit E) and in its oral argument before the Court (see attached affidavit of Russell H. Cullen, attached hereto as Exhibit F), that *Day v. Highpoint Condominium Resorts, Ltd.*, 521 So.2d 1064 (Fla. 1988), was controlling in this case. The Tax Collector further argued that, because of the specific holding in *Day* that Section 192.037, Florida Statutes, was constitutional, that the Plaintiffs in this action were entitled to no relief from the Third District Court of Appeal.

In their per curiam decision, the Third District Court of Appeal completely rejected the Tax Collector's argument, finding instead that the Plaintiffs had, "demonstrated a prima face showing of irreparable harm from the impending loss of their property interests, an inadequate remedy at law, and a

likelihood of probable success on the merits of their action...." *Southards v. Motel Management Co.*, 567 So.2d 523, 524 (Fla. 3d DCA 1990).

The doctrine of law of the case requires that questions of law decided on appeal to a superior court must govern the case at the trial court level throughout all subsequent stages of the proceeding. It applies to all questions that were actually considered and decided by the Appellate Court. *Barry Hinnant, Inc. v. Spottswood*, 581 So.2d 80, 82 (Fla. 1st DCA 1986).

In the present case, the only issue argued before the Third District Court of Appeal by the Tax Collector was that *Day v. Highpoint* applied to the facts before the Court and acted to deprive the Plaintiffs of the relief they requested. The holding of the Third District Court of Appeal in *Southards v. Motel Management Co.*, clearly indicates that, even if *sub silentio*, that the Court found no merit in that argument. As a matter of law, the trial Court must view *Day v. Highpoint* as not controlling in this case.

DEFENDANTS' AFFIRMATIVE DEFENSES ARE INAPPOSITE AND DO NOT PRESENT A BAR TO PLAINTIFF'S DECLARATORY RELIEF LACHES DOES NOT APPLY

20. Defendant, Department of Revenue (hereinafter the "Department"), alleges that the defense of laches constitutes an impediment to the Court granting Plaintiffs the relief they have requested. The Department has apparently abandoned this defense since it is not mentioned or substantiated in the Department's Amended Motion for Summary Judgment or the Memorandum of Law in support of that motion.

Notwithstanding that fact, the Department has failed, in the discovery process, to adduce any facts to support this contention or cited any authority to bolster their position.

The elements of laches are:

a) Conduct on the part of the Defendant giving rise to the situation of which the complaint is made,

b) Delay in asserting the Plaintiff's rights, Plaintiff having had an opportunity to institute suit,

c) Lack of knowledge or notice on the part of the Defendant that the Plaintiff would assert said right, and

d) Disadvantage or prejudice to the Defendant as a result of the lapse of time.

Devine v. Department of Professional Regulation, 451 So.2d 994, 996 (Fla. 1st DCA 1984). The most critical element to the defense of laches is the element of injury to the person against whom the relief is sought. *Id.* at 997.

In the present case, the Department has only made only legal conclusions regarding the affirmative defense of laches and has not adduced any factual basis to support that defense. It has not established the defense of laches as a bar to relief from the Court to the Plaintiffs.

THE DOCTRINE OF RES ADJUDICATA IS NOT APPLICABLE

21. The conditions requisite to the application of the doctrine of res adjudicata are well settled. There must be: 1) identity of the things sued for; 2) identities of the causes of action; 3) identity of persons and parties to the action; and 4) identity of the quality or capacity of the person or persons

against whom the claim is made. *Liberty Mutual Insurance Co. v. Jozwick,* 204 So.2d 216, 218 (Fla. 3d DCA 1967).

In the present case, the Defendants have alleged that the doctrine of *res adjudicata* bars the declaratory relief requested by Plaintiffs. The Defendants have failed to establish any of the necessary elements regarding their contention that the doctrine of *res adjudicata* is applicable.

a) THE PARTIES TO THE ACTION ARE NOT IDENTICAL

In the cases upon which the Defendants rely, *Ocean 80 Resort Owners Association, Inc. v. Higgs* case number 87-20-075-CA-18 and *Ocean 80 Resort Owners Association, Inc. v. Higgs,* case number 88-20-076-CA-18, the managing entity sued the Monroe County Property Appraiser and the Tax Collector. It is obvious that neither Motel Management nor the Department of Revenue were a party to the action. It is also apparent that the Plaintiffs in the present case were not parties to the action and were not in privity with the Plaintiff therein.

Section 192.037(1), Florida Statutes, makes the managing entity, the Plaintiff in the 1987 and 1988 cases, the agent for the time-share period title holder for purposes of ad valorem taxation and special assessments. This statute must be strictly construed. *Sterling Village Condominium, Inc. v. Breitenbach,* 251 So.2d at 688. The statute does not establish an agency relationship for any litigation and is directed only toward the collection and payment of ad valorem taxes. Moreover, the allegations in paragraph 10(d) of the Complaints themselves, indicate that the managing entity only represents some of the

owners who are disputing the validity of their assessments. Finally, the Plaintiffs in this case were never informed, never consented to, or never in any way empowered the managing entity to proceed on their behalf in the aforementioned cases regarding tax assessments. Deposition of Kathleen Southards at page 26, attached hereto as Exhibit B.

Without establishing such privity of the Plaintiff parties, the doctrine of res adjudicata does not constitute a bar to Plaintiffs requested relief. *Liberty Mutual Insurance Co. v. Jozwick*, 204 So.2d at 218.

b) THE RELIEF SOUGHT IS NOT IDENTICAL

It is undisputed that, as to Count III of Plaintiffs' Second Amended Complaint, the tax certificates issued by Knight and sold to Motel Management were not in existence at the time of the prior litigation and no partial payments had been accepted by the Tax Collector. No relief was requested regarding any tax certificates. The deposition of Harry F. Knight at page 20; *Southards v. Motel Management Co.*, 567 So.2d at 524.

In the 1987 and 1988 cases brought by the managing entity, the only indication that the *application* of the statute was questioned is enunciated in the language following paragraph 11 which states that the Plaintiffs pray for a declaratory judgment that Section 192.037, Florida Statutes, is unconstitutional on its face *as applied to the subject property*. It is undisputed that the parties to the 1987 and 1988 litigation entered into a stipulation by which they agreed to be bound by the holding of the Florida Supreme Court in *Day v. Highpoint Condominium Resorts, Ltd.*, 521 So.2d 764 (Fla. 1988). The holding in *Day* is limited to the

facial constitutionality of Section 192.037, Florida Statutes. Id. at 1065, 1067. The holding of the Court in *Day*, by the law of the case, has already been held by the Third District Court of Appeal to be inapplicable to Plaintiffs' Complaint for Declaratory Relief. *Southards v. Motel Management Co.*, 567 So.2d at 524.

Simply stated, the relief sought in the 1987 and 1988 cases was and is not identical to the relief sought by the Plaintiffs in the present case. In the present case, the Defendants have failed to establish the requisite elements of res adjudicata. The defense of res adjudicata, therefore, poses no bar to Plaintiffs' declaratory relief. *Liberty Mutual Insurance Co. v. Jozwick*, 204 So.2d at 218.

THE DOCTRINE OF COLLATERAL ESTOPPEL IS NOT APPLICABLE

22. Collateral estoppel, also known as estoppel by judgment, estoppel by verdict, and issue preclusion, is a judicial doctrine which prevents identical parties from relitigating issues that have previously been decided between them. *Mobil Oil Corporation v. Shevin*, 354 So.2d 372, 374 (Fla. 1977). The conditions requisite to the establishment of collateral estoppel as a defense are that: 1) the parties and issues be identical, and; 2) that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction. *Id.* Where the parties are the same but the causes of action in two suits are different, the defense of collateral estoppel applies. Only the matters actually litigated and determined in the initial action are foreclosed in the subsequent

case. *Eastern Shores v. City of North Miami Beach*, 363 So.2d 321, 323 (Fla. 1978).

In the present case, as already stated under the section of this motion dealing with res adjudicata, the parties and issues in the present case are not identical to those in the 1987 and 1988 litigation. The pleadings filed with the Court in 1987 and 1988 by the Defendants fail to demonstrate that the facts and questions regarding the constitutionality of the application of Section 192.037 or the unlawfulness of the tax certificates were ever entertained or put at issue or actually determined by the Court in its Orders in favor Defendant Higgs. Contrary to Defendants' allegations, the Plaintiffs must be provided an opportunity to present their individual case, not common to the previous actions brought by the managing entity. *See e.g., Argerenon v. St. Andrews Cove I Condominium Association, Inc.*, 507 So.2d 709, 710 (Fla. 2d DCA 1987). The doctrine of collateral estoppel is not applicable in the present case.

THE DOCTRINE OF WAIVER IS NOT APPLICABLE

23. A waiver is the intentional relinquishment of a known right or a voluntary relinquishment of a known right or conduct which warrants an inference of a relinquishment of a known right. *Opler v. Wynne*, 402 So.2d 1309, 1311 (Fla. 3d DCA 1981).

Defendant, Department of Revenue, raised the affirmative defense of waiver in their answer to Plaintiffs' Second Amended Petition. The Department has adduced no facts to substantiate such a waiver by Plaintiffs. Their claim that Plaintiffs should have raised their constitutional issues regarding Section 192.037

(2) and (7), Florida Statutes, in the 1984, 1985, 1986, and 1987 complaints filed by other parties, is simply without merit. The Tax Collector did not accept partial payment from the Plaintiffs at that time, the tax certificates had not been issued at the time of that litigation, and the unconstitutional *application* of Section 192.037 (2) and (7) had not become apparent to Plaintiffs during the previous litigation. *Southards v. Motel Management Co.*, 567 So.2d at 524.

WHEREFORE, based upon the foregoing, the Plaintiffs respectfully request this Honorable Court enter an Order Granting their Second Motion for Summary Judgment.

A-70

IN THE DISTRICT COURT OF APPEAL FOR THE THIRD DISTRICT OF FLORIDA

APPEAL NO: 92-00544

LT NO: 90-20122-CA-18

GENE SOUTHARDS AND KATHLEEN SOUTHARDS, Husband and Wife,

Appellants,

vs.

MOTEL MANAGEMENT COMPANY, n/k/a B & M Management Company, Inc., a Florida Corporation, HARRY F. KNIGHT, Tax Collector, Monroe County, Florida, and J. THOMAS HERNDON, Executive Director, Department of Revenue, State of Florida.

Appellees. **CLASS REPRESENTATION**

_____/

Appeal from a Final Order from the Circuit Court, Civil Division of the Sixteenth Judicial Circuit, in and for the Monroe County, State of Florida.

APPELLANTS' INITIAL BRIEF

Respectfully submitted,

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PRELIMINARY STATEMENT

In this brief, the Appellants, Gene Southards and Kathleen Southards, and the members of the Class will be referred to as the "Southards." Appellee Motel Management Company n/k/a B & M Management Company, Inc., a Florida corporation, will be referred to as "Motel." Appellee Harry F. Knight, Tax Collector, Monroe County, Florida, will be referred to as "Knight." Appellee J. Thomas Herndon, Executive Director, Department of Revenue, State of Florida, will be referred to as the "Department."

Plaintiffs, Gene Southards and Kathleen Southards, husband and wife, as class representatives, appeal an Order denying summary judgment to Plaintiffs and granting summary judgment to Defendants Motel Management Company, n/k/a B & M Management Company, Inc., et al. This is the initial brief of the Plaintiffs/Appellants who will be referred to as the "Southards." Appellee Motel Management Company, n/k/a B & M Management Company, Inc., will be referred to as "Motel." Appellee J. Thomas Herndon, Executive Director, Department of Revenue, State of Florida, will be referred to as the "Department." Defendant Harry F. Knight, Tax Collector, Monroe County, Florida, will be referred to as the "Tax Collector."

Citations to the record on appeal will be made by the letter "R." and page number. Unless otherwise indicated, all emphasis is original.

STATEMENT OF THE CASE

On March 30, 1990, the Southards filed a Class Action lawsuit pursuant to Florida Rule of Civil Procedure 1.220(b)(2) to petition the Circuit Court of the Sixteenth Judicial Circuit, in and for Monroe County, Florida, for relief in equity against Motel and Tax Collector. (R. 1-13) More particularly, the Southards requested in Count I of their petition that the court issue a temporary injunction to preserve the Southards' time-share property interest from imminent defeasance by action of Tax Collector and Motel before the merits of the Southards' petition could receive a final hearing from the court. (R. 8-9) In Count II of their Second Amended Petition, the Southards sought a judgment declaring Section 192.037(2) and (7), Florida Statutes, unconstitutional as applied to them. (R. 180-181) In Count III of their petition, the Southards sought a judgment declaring the tax certificates issued to Motel by Tax Collector for tax years 1984 through 1988, encumbering the Southards' time-share property interest, as void *ab initio* and unenforceable. (R. 181)

On April 12, 1990 the court entered an Order denying the Southards' request for temporary injunctive relief. (R. 20)

A timely Notice of Appeal of the court's denial of the Southards' request for temporary injunction was filed on April 17, 1990. Upon a review of the lower court's decision, this Court reversed the lower court's denial and remanded the case to the lower court with instructions that the injunction should be issued and that the Southards be required to post only a

nominal bond. *Southards v. Motel Management Company*, 567 So.2d 523 (Fla. 3d DCA 1990).

Upon Southards' Second Motion for Summary Judgment (R. 1066-1113), Motel's Motion for Summary Judgment (R. 812-814) and Amended Motion for Summary Judgment (R. 820-821), and the Department's Amended Motion for Summary Judgment (R. 1151-1153), the Court entered a Summary Final Judgment on February 19, 1992 (R. 1285-1294), denying Southards' Second Motion for Summary Judgment and granting the Motions filed by Motel and the Department.

A timely Notice of Appeal of the Order of Final Summary Judgment was filed by the Southards on March 6, 1992. (R. 1295).

STATEMENT OF FACTS[1]

The Southards are fee simple owners of one week of an interval ownership condominium unit (time-share) at Ocean 80 Resort (the "Resort"), located in Islamorada, Florida. (R. 172) The Southards own the thirty-second week of each year for the unit. They also own a remainder in fee simple as tenants-in-common with the other fifty-one unit week owners of their unit. (R. 1251) Pursuant to the provisions 192.037, Florida Statutes, during the period 1984 through 1988, the Southards regularly paid the assessments billed to them by the managing entity of the Resort for the payment of common expenses, including a portion earmarked for the payment of ad valorem taxes on the Resort. (R. 1252) Of the 4,029 unit weeks at the Resort, only 883 unit owners regularly paid the assessment billed them by the managing entity. (R. 1252) Because of this fact, from 1984 through 1988, the managing entity failed to collect sufficient sums from the unit owners to pay the budgeted expenses, including ad valorem taxes. (R. 1251-52) For each year from 1984 through 1988, the managing entity failed to pay Tax Collector the total amount of ad valorem taxes due (R. 1252) and Tax Collector refused to accept partial payment from the managing entity or the Southards because of the prohibition of Section 192.037(7), Florida Statutes. (R. 1254)

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[1] An Agreed Statement of Facts was filed by the parties in anticipation of Cross-Motion for Summary Judgment. Pertinent excerpts are set forth in the Statement of Facts.

Pursuant to Section 197.432, Florida Statutes,[2] Tax Collector offered for sale and Motel purchased the tax certificates for the unpaid taxes on the Resort, including the Southards' property interest. (R. 1254) Faced with the imminent loss of their property interest due to the impending sale of their property for the tax arrearages (R. 1254), the Southards filed a class action lawsuit against Tax Collector, Motel, and the Department,[3] seeking, in Count I, the issuance of an injunction to stop the impending public auction of the Resort as a result of Motel's application to obtain a tax deed pursuant to Section 197.502, Florida Statutes. The members of the Class are owners of fee time-share units at the Resort who have paid their annual assessments to the managing entity for

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2 Section 197.432(1), Florida Statutes, provides: On the day and approximately at the time designated in the notice of the sale, the tax collector shall commence the sale of tax certificates on those lands on which taxes have not been paid, and he shall continue the sale from day to day until each certificate is sold to pay the taxes, interest, costs, and charges on the parcel described in the certificate. In case there are no bidders, the certificate shall be issued to the county. The tax collector shall offer all certificates on the lands as they are assessed.

3 Defendant J. Thomas Herndon, the Executive Director of the Department of Revenue for the State of Florida is a required party pursuant to Section 194.181(5), Florida Statutes. (R. 173)

years 1984 through 1988, in accordance with Section 192.037(5), Florida Statutes,[4] and yet they still face the imminent loss of their property interest as a result of the public tax auction of the entire Resort. (R. 1252)

In Count II of their petition, the Southards petitioned the court to declare Sections 192.037(2) and (7),[5] Florida Statutes, as unconstitutional in its application to the Southards in that the statute would ultimately result in the loss of the Southards' property interest due to tax delinquencies although *they* have fully complied with the terms of the statute.

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4 Section 192.037(5), Florida Statutes, provides: The managing entity, as an agent of the time-share period titleholders, shall collect and remit the taxes and special assessments due on the fee time-share real property. In allocating taxes, special assessments, and common expenses to individual time-share period titleholders, the managing entity must clearly label the portion of any amounts due which are attributable to ad valorem taxes and special assessments.

5 Sections 192.037(2) and (7), Florida Statutes, provides: (2) Fee time-share real property shall be listed on the assessment rolls as a single entry for each time-share development. The assessed value of each time-share development shall be the value of the combined individual time-share periods or time-share estates contained therein. (7) The tax collector shall accept only full payment of taxes and special assessments due on the time-share development.

In Count III, the Southards petitioned the court to declare the tax certificates issued by Tax Collector and purchased by Motel to be void *ab initio* since Tax Collector had already accepted $178,509.98 from the managing entity as a tax payment[6] and applied that sum to the outstanding ad valorem tax indebtedness on the Resort to reduce the amount due and owing. (R. 1253) The 883 members of the Plaintiff Class represented by the Southards constitute approximately 22 percent of the time-share unit owners. (R. 1252) The $178,509.98 received by the Tax Collector, and applied by the Tax Collector in 1988 to decrease the amount due and owing on the Resort constituted approximately 25 percent [$178,509.98 ÷ $714,548.46 = 24.98%] of the $714,548.46

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6 The managing entity filed suit in Monroe County, Florida, contesting the ad valorem tax assessment for 1984. By stipulation of the managing entity, the Tax Collector and the Tax Assessor of Monroe County, Florida, the 1984 suit was consolidated with similar tax assessment suits filed by the managing entity for tax years 1985, 1986 and 1987. Section 194.171(3), Florida Statutes, required the managing entity, as a prerequisite to bringing these suits, to pay to the Tax Collector what the managing entity admitted in good faith to be owing as ad valorem taxes. In conformity with this provision, the managing entity paid to the Tax Collector $178,509.98. (R. 1252) On August 29, 1988, the Court granted summary judgment in favor of the Tax Collector and the Tax Assessor and against the managing entity. (R. 1252-53)

demanded by the Tax Collector from the managing entity on September 30, 1988. (R. 1253)

The value of Ocean 80 Resort for tax assessment purposes is in excess of $10,000,000.00. (R. 1254) Motel holds tax certificates for 1984 through 1988, totaling over 1.6 million dollars. (R. 1254) The Southards originally purchased their time-share unit at Ocean 80 Resort for $3,940.00. (R. 1250)

SUMMARY OF ARGUMENT

The payment to the Tax Collector by the managing entity of $178,509.98 constituted payment of the amount due and owing in ad valorem taxes to the Tax Collector for the Southards' and other class members' property interest. Because the Tax Collector had unlawfully accepted partial payment of taxes as prohibited by Section 192.037(7), Florida Statutes, the tax certificates encompassing the Southards' time-share property interest, issued by the Tax Collector and purchased by Motel, are void *ab initio*. When the Tax Collector applied the monies paid to him by the managing entity to reduce the amount due and owing on the Resort, the Tax Collector's power to sell the Southards' property interest ceased to exist. The tax certificates should be ruled void *ab initio* and reissued excluding the Southards' and other class members' property interest.

The Southards' property interest is a fundamental one. Viewed from a due process perspective, the application of Section 192.037(2) and (7), Florida Statutes, unjustifiably and unreasonably transgresses the fundamental restrictions on the power of the State in that it will act to deprive the Southards of their real property interest, even though they have paid their taxes, merely for the convenience of the Tax Collector. This reason does not satisfy the compelling interest which must be shown by the State in order for Section 192.037(2) and (7), to be held constitutional.

Under an equal protection analysis, the adoption of Section 192.037 has created a special class: the time-share property

owner of which the Southards are members. The application of Subsection 2 and Subsection 7 of that statute, violates the Southards fundamental property interest by allowing the Tax Collector to deprive them of their property even after they have complied with the provisions of the statute and have paid their taxes. The rationale of convenience does not provide a State interest adequate to survive the application of the strict scrutiny test and, therefore, the statute is unconstitutional as applied to the Southards.

For the foregoing reasons, the Order of Final Summary Judgment entered for Motel and the Department is incorrect. As a matter of law, the Southards are entitled to an entry of an Order of Summary Judgment declaring the tax certificates void and Sections 192.037(2) and (7), Florida Statutes, unconstitutional as applied.

ARGUMENT

I: THE TAX CERTIFICATES ARE VOID *AB INITIO* AND UNENFORCEABLE

In Florida, a time-share property interest, like a condominium property interest, is a creature of statute. It is subject to the control and the regulation of the legislature. *Century Village, Inc. v. Wellington*, 361 So.2d 128, 133 (Fla. 1978). To provide protection to the buyer of such a legislatively created property interest, the statutory provisions establishing and regulating that property interest must be strictly construed to "assure these investors that what the buyer sees the buyer gets." *Sterling Village Condominium, Inc. v. Breitenbach*, 251 So.2d 685, 688 (Fla. 4th DCA 1971). Where an ambiguity exists, it is the duty of the Court to construe tax statues in favor of the tax payers. *Harbor Ventures, Inc. v. Hutches*, 366 So.2d 1173, 1174 (Fla. 1979).

Section 192.037(7), Florida Statutes, clearly provides: "the tax collector shall accept only fully payment of taxes in special assessments due on the time-share development." In the present case, the Tax Collector accepted $178,509.98 from the managing entity. The Tax Collector used those funds to reduce the amount of outstanding ad valorem taxes due on the Resort. There can be no dispute that the Tax Collector has violated the plain language of Section 192.037(7).

In defense of this clear violation, Motel and the Department would have the court apply the provisions of Section 194.171(3), Florida Statutes, as taking precedent over the partial payment prohibition of Section 192.037(7). Motel and

the Department have convinced the lower court that the $178,509.98 paid to the Tax Collector on behalf of the Southards and the other members of the class should be "found money" even though it violates the provisions of the time-share law. In order to "have his cake and eat it to," the Tax Collector would then have the court impose the restriction of the time-share law regarding payment of taxes on the Southards so as to deprive them of their property interest while not affording them the statutory remedies of Section 197.373, Florida Statutes[7], which provides payment of a part of the tax notice when the part to be paid can be ascertained by legal description, as is possible with the Southards' property interest in the present case.

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7 Section 197.373, Florida Statutes, provides that: (1) The tax collector of the county is authorized to allow the payment of a part of a tax notice when the part to be paid can be ascertained by legal description, such part is under a contract for sale or has been transferred to a new owner, and the request is made by the person purchasing the property or the new owner or someone acting on behalf of the purchaser or owner. (2) The request must be made at least 15 days prior to the tax certificate sale. (3) The property appraiser shall within 10 days after request from the tax collector apportion the property into the parts sought to be paid or redeemed. (4) This section does not apply to assessments and collections made pursuant to the provisions of s. 192.037.

The ultimate result of the Tax Collector's violation of Section 192.037(7), is that shortly thereafter, the Tax Collector offered for sale and Motel purchased the tax certificates for the unpaid taxes on the Resort. Those tax certificates encompassed the time-share property interest held by the Southards and the other member of the class. (R. 1254) But for the temporary injunction issued by the trial court, the Tax Collector would have sold the Southards' property interest on the Monroe County Courthouse steps for tax arrearage.

It has long been held in Florida that the sale of real property for taxes which had already been paid by the owner is against public policy and unlawful. *Conant v. Buesing*, 23 Fla. 559, 2 So. 882, 884 (1887); *Garner v. Larkin*, 132 So. 2d 298, 299 (Fla. 2d DCA 1961). This rule of law has been codified in Section 197.442(1), Florida Statutes, which provides that if the tax collector sells tax certificates on land upon which taxes have been paid, and is notified by the tax payer of that fact, the tax collector shall cancel any improperly issued tax certificates or deed. The statute also makes the tax collector liable to the aggrieved tax payer for the costs incurred by that tax payer in clearing the title to his property.

The amount paid to the Tax Collector by the managing entity was approximately 25 percent of the outstanding ad valorem tax arrearages on the Resort. This payment was made on behalf of approximately 22 percent of the property owners, the Southards and the other members of the class. Once again, Motel and the Department would have the Tax Collector ignore the restrictions of Section 192.037(7) while imposing those

same limitations of the time-share law on the Southards so as to deprive them of their property interest. In effect, Motel and the Department would have the court resolve any conflict between the provisions of Chapters 192, 194, and 197, so as to allow the Tax Collector to use the law as a sword but prohibit the Southards from relying on those provisions as a shield.

It is well established in Florida that, on a Motion for Summary Judgment, the court may base its ruling only on the uncontradicted evidence and may not weigh the evidence in order to arrive at a factual conclusion necessary for granting summary judgment. *Davis v. Hathaway,* 408 So.2d 688, 689 (Fla. 2d DCA 1982). Further, summary judgment is not proper if the uncontested facts are reasonably acceptable to conflicting inferences. *Burkett v. Parker*, 410 So.2d 947, 948 (Fla. 1st DCA 1982).

The Order of Summary Final Judgment (R. 1285), clearly reveals that the court misconstrued the Agreed Statement of Facts between the parties, improperly drew inferences from those facts, and improperly applied the law in reaching its decision. In paragraphs 5 and 15 of its Order, the court states that the managing entity failed to pay the ad valorem taxes due and owing on the development. (R. 1287, 1289-90) Contrarily, the court finds that the managing entity paid $178,509.98 to the Tax Collector between 1984 and 1987. The Tax Collector accepted that amount from the managing entity on behalf of the Southards and the other members of the class and used that sum to reduce the amount of outstanding taxes due and owing on the Resort. (R. 1287-88)

The record clearly shows that the court's finding that the managing entity paid no ad valorem taxes is simply in error. Its judgment for Motel and the Department that the tax certificates are not void is, therefore, incorrect. Under the facts of this case, since the Tax Collector has accepted partial payment of the ad valorem taxes due and owing on the Southards real property interest, the court should have granted summary judgment in favor of the Southards and held that the tax certificates are void *ab initio*.

The tax certificates are void because their issuance and sale, encompassing property upon which the taxes have already been paid, violates longstanding Florida law and the provisions of Section 197.442. The tax certificates are void because their issuance and sale is a direct result of a violation of the prohibition against partial payment of ad valorem taxes set forth in Section 192.037(7). The tax certificates are void because any conflict and ambiguity within the statutory scheme should have been resolved in favor of the Southards as tax payers.

The finding of the trial court that the tax certificates were not void *ab initio* was the result of the court ignoring the manifest injustice caused by the Tax Collector's actions and the clear intent of the legislature to protect the Southards and the members of their class, as time-share unit owners, from the deprivation of their legislatively created property rights. *Sterling Village Condominium, Inc. v. Breitenbach*, 251 So.2d 685, 688 (Fla. 4th DCA 1971). Once the tax certificates are viewed as void *ab initio* the tax certificates could then be

reissued, excluding unit weeks owned by the Southards and the other member of the class who have already paid their taxes. Only by such a scheme can the two conflicting provisions of law be reconciled without violating the Southards constitutionally protected, fundamental property rights.

II: THE APPLICATION OF SECTION 192.037(2) and (7), FLORIDA STATUTES, IS FUNDAMENTALLY UNFAIR AND CONSTITUTES A VIOLATION OF THE SOUTHARDS DUE PROCESS RIGHTS

In the present case, the application to the Southards of Section 192.037(2) and (7), Florida Statutes, will ultimately result in the defeasance of their time-share property interest even though they have fully complied with the Statutes regarding the payment of their taxes. Subsection 2 allows the Tax Collector to list the entire resort as a single entry for purposes of ad valorem taxation. Subsection 7, in effect, prohibits the Southards from paying the ad valorem taxes due on their unit. Under the facts of the present case, these sections, taken together, have provided the Tax Collector with mechanism to sell the Southards' time-share property interest for delinquent taxes, even though the Southards have paid their taxes for the years 1984 through 1988 in accordance with the provision of Section 192.037.

The right to acquire and own property, as set forth in Article I, Section 2, of the Florida Constitution, and the Fifth and Fourteenth to the United States Constitution, is a *fundamental* right which is a part of the Southards' natural liberty, guaranteed as inviolate to every American. *Corn v. State*, 332 So.2d 4, 7 (Fla. 1976). It is well established that, when the legislature creates a property interest, as in the case of time-share property, such property rights should be protected and enforced by due process of law. *City of Winter Haven v. A.M. Kleem & Son*, 132 Fla. 334, 181 So. 153, 164 (1938).

Where the state seeks to regulate a fundamental right, as the Southards' property right in the present case, such regulation limiting or divesting these rights may be justified only by demonstrating a compelling state interest. *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, 178 (1973). In the case of a legislative act, it must be examined to determine whether it unreasonably and unjustly violates the fundamental restrictions on the power of the state to intrude upon individual rights. *Patch Enterprises, Inc. v. McCall*, 477 F. Supp. 1075, 1080 (M.D. Fla. 1978).

When the legislature enacted Section 192.037(2) and (7), it intended to minimize the burden which time-share ownership would create for the tax collectors of Florida. *Day v. Highpoint Condominium Resorts, Ltd.*, 521 So.2d 1064, 1065-66 (Fla. 1988).[8] In order to determine whether the state interest in this case is substantial and compelling, it requires the court to inquire whether the means adopted to achieve the legislative goal are necessarily and precisely drawn, and whether there are reasonable, alternative means of reaching that goal. *Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed. 2d 63 (1973). In

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[8] Although the Court in *Day v. Highpoint Condominium Resorts, Ltd.*, found the provisions of Section 192.037 facially constitutional, it readily admitted that there had been no contention that the tax collector had issued notices of delinquent taxes, sold tax certificates, or that there had been an application for a tax deed effecting the property interest at issue. 567 So.2d at 1067.

this light, the need for tax collection efficiency cannot overcome the constitutional protections which guarantee the Southards the fundamental rights to acquire, possess, and protect their property. The economy of effort of the tax collector can be achieved without prohibiting the payment of taxes by individual property owners directly to the Tax Collector when the statutory scheme of agency otherwise fails. *See, e.g.*, Cal. Rev. & Tax. Code, Sections 2188.8 and 2188.9 (West 1990) (separate tax assessment and tax billings for time-share estates). This argument becomes more compelling when one realizes the small pecuniary costs which the Tax Collector would incur by sending out individual notices to each time-share owner. The Tax Collector estimated, in his deposition, that the cost of generating and mailing property tax bills to each property owner in Monroe County is approximately $6.98. (R. 280)

The Southards have paid their taxes as they have been directed by statute for the years 1984 though 1988, inclusive. They are prohibited by the statutory scheme set forth in Section 192.037(2) and (7), from any other method of payment. The monies paid to the managing entity from 1984 through 1987 have already been paid and accepted by the Tax Collector. Notwithstanding this fact, the Southards still face the imminent loss of their property due to tax delinquency because of the application of the time-share statute. *Southards v. Motel Management Co.*, 567 So.2d 523, 524 (Fla. 3d DCA 1990). The fundamental unfairness of this result, coupled with the lack of a compelling state interest militates that the Court rule as a

matter of law that Section 192.037(2) and (7) unconstitutionally invades the due process rights of the Southards. Furthermore, the application of Section 192.037(2) and (7) will violate the well established principle that, where taxes have already been paid, it is against public policy and unlawful to sell real property at public auction for tax deficiencies. *Conant v. Buessing*, 23 Fla. 559, 2 So. 1182, 884 (1887).

In reviewing an Order of Final Summary Judgment, the Appellate Court must draw every possible inference in favor of, and view the fact in a light most favorable to, the party against whom summary judgment was granted. *Wills v. Sears, Roebuck & Company*, 351 So.2d 29, 32 (Fla. 1977); *McGahee v. Dade County Board of Public Instruction*, 279 So.2d 87, 88 (Fla. 3d DCA 1973). It is apparent from the review of the Order of Final Summary Judgment, that the Court has applied an incorrect standard to measure the constitutionality of the time-share statute. The Court has failed to view the Southards' property interest as a fundamental one, has failed to demand that the State demonstrate compelling State interest to justify the time-share tax statute, and has, therefore, arrived at an erroneous conclusion that Section 192.037(2) and (7), Florida Statutes, is constitutional.

In its Order of Summary Final Judgment, the court appears to give great weight to the contention that the time-share statute provides a remedy to the time-share unit owners in the Southards' position. (R. 1289) Section 192.037(8), Florida Statutes, provides that the *managing entity* shall have a lien on

the time-share periods for the taxes and special assessments. Contrary to the Court's conclusion in its Order of Summary Final Judgment, this statutory remedy is provided to the managing entity not the Southards.

Even if the Court were to determine that this statutory remedy inures to the Southards, the deposition testimony of all those witnesses who testified about such a remedy, K. Neil Glassford, Esquire, the attorney for the managing entity, (R. 695-702), Karl Beckmeyer, Esquire, (R. 1048, 1057-1060), indicated that such a lien is worthless. It was uncontested that pursuing liens and foreclosures under Section 192.037(8), could in fact expose the managing entity to more financial liability or debts than the managing entity already had. (R. 696-97)

It is well established in Florida law that a party is not required to do what is unreasonable, impractical, or futile simply because it is an available remedy. It is not a prerequisite for a claim for damages to pursue a futile course of conduct, nor will the failure to pursue such a futile course constitute a bar to the recovery of damages. *Ballard & Ballard v. Pelaia*, 73 So.2d 840, 842-43 (Fla. 1954).

It is clear from the plain language from the statute that the Southards are provided with no remedy under Section 192.037(8), Florida Statutes. Notwithstanding that fact, it is uncontradicted that such a remedy is worthless in the present case. As such, the lower court's determination that this remedy imposed an impediment to granting summary judgment in favor of the Southards is simply without basis in law and fact.

The pleadings, depositions, answers to interrogatories and admissions on file in this case demonstrate that, regarding Plaintiff's Second Motion for Summary Judgment, there are no genuine issues as to any material fact and that the Southards are entitled to a judgment as a matter of law that Section 192.037(2) and (7), Florida Statutes, is unconstitutional as applied because it violates the Southards due process rights as provided by Article I, Sections 2 and 9 of the Florida Constitution and the Fifth and Fourteenth Amendments to the Constitution of the United States.

III: THE APPLICATION OF SECTION 192.037(2) AND (7), FLORIDA STATUTES, VIOLATES THE SOUTHARDS' FUNDAMENTAL PROPERTY RIGHT AND, UNDER THE STRICT SCRUTINY TEST, THE STATE LACKS A COMPELLING JUSTIFICATION.

In the present case, the application of Section 192.037(2) and (7), Florida Statutes, will ultimately result in the defeasance of the Southards' fundamental, time-share property interest, even though the Southards have fully complied with the statute and paid their taxes. The application of Section 192.037(2) and (7), to the Southards is fundamentally unfair and deprives them of their fundamental property interest merely for the convenience of the Tax Collector.

As previously stated, the Southards' property interest is a fundamental one. *Corn v. State*, 332 So.2d 4, 7 (Fla. 1976). As with any legislatively created property interest, the Southards time-share property rights should be protected and enforced. *City of Winter Haven v. Kleem & Son,* 132 Fla. 334, 181 So. 153, 164 (1938).

When the legislature enacted Section 192.037(2) and (7), it intended to minimize the burden which time-share ownership would create for the tax collectors of Florida. *Day v. Highpoint Condominium Resorts, Ltd.*, 521 So.2d 1064, 1065-66 (Fla. 1988). To achieve this goal, the legislature created a special class of real property tax payers: the time-share unit week property owner. The Southards are a member of that Class. The State is without the right to treat the Southards differently as a Class with relation to their fundamental property rights without

meeting the measure of the strict scrutiny test. *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed., 220 (1886); *Florida High School Activities Association, Inc. v. Thomas,* 434 So.2d 306, 308 (Fla. 1983).

To apply this strict scrutiny analysis to the facts in the present case, the Court must carefully examine the interest claimed by the State to justify the special classification set up in Section 192.037. In order to determine whether that interest is substantial and compelling, it requires the Court to inquire as to whether the means adopted to achieve the legislative goal are necessarily and precisely drawn. *Re: The Estate of Greenberg*, 390 So.2d 40, 42 (Fla. 1980). The application of this test by the Court is almost always fatal to the statutory provision under such scrutiny. *Id.* at 42-43.

The need for tax collection efficiency cannot overcome the protections which guarantee the Southards their equal protection rights to acquire, possess, and protect their property under the Fourteenth Amendment to the Constitution of the United States. As previously stated, the loss of the Southards' property to a tax auction is a heavy price to pay for the $6.98 costs to the Tax Collector of providing individual notices to the tax payer in Monroe County. (R. 280)

As applied to the Southards, the application of Section 192.037(2) and (7) fails to meet the strict scrutiny test and, therefore, the statute must be held unconstitutional in that violates the Southards' fundamental property rights. *Shapiro v. Thomas*, 394 U.S. 618, 89 S.Ct. 1332, 22 L. Ed.. 2d 600 (1969). The Southards have paid their taxes as they have been

directed by statute for the years 1984 through 1988. They are prohibited by the Statutory scheme set up for the time-share property owners from any other method of payment. The monies paid by the Southards to the managing entity for ad valorem taxes have already been paid to the Tax Collector. Notwithstanding this fact, the Southards still face the imminent loss of their property due to tax delinquency because they are members of a legislatively created class which the time-share statute allows to be unfairly disadvantaged by the Tax Collector.

In its Order of Summary Final Judgment, the Court states that the Southards made no claim in their Second Amended Complaint alleging the unconstitutionality of Section 192.037(2) and (7), based on the denial of equal protection. The Court reasons that, because of this omission, it need not address any alleged violation of the Southards' equal protection rights under the Fourteenth Amendment to the Constitution of the United States. (R. 1290)

It is admitted that the Southards' Second Amended Complaint failed to plead that the statute was unconstitutional on equal protection grounds. However, as early as May, 1991, the Southards argued the issue of equal protection and, in response to the Southards' Motion of Summary Judgment (R. 190), both Motel and the Department filed Memoranda of Law arguing the equal protection issue. (R. 225 and 241) Again in the Second Motion for Summary Judgment, the Southards, Motel, and the Department, all address the issue of equal protection in their pleadings. (R. 1066, 1154, 833, 1004, 1122,

1154, and 1191) The lower court refused to rule on the equal protection issue even though all the parties had argued and briefed the issue in their pleadings.

On appeal from a grant of summary judgment, the reviewing court is not barred from looking beyond the issues presented in the pleadings. *Forte v. Tripp & Skrip,* 339 So.2d 698, 700 (Fla. 3d DCA 1976).

Where the inclusion of a fact or issue will not produce substantial prejudice to a party, it may be considered by the reviewing court and leave to amend the pleading may be granted. *Minnehoma Automobile Association, Inc. v. Bill Seidle's Nissan, Inc.*, 560 So.2d 385, 386 (Fla. 3d DCA 1990). Moreover, it is quite clear that the courts have viewed the equal protection doctrine as no more than substantive due process by another name and that challenges to legislative activity can be viewed from either analytical perspective. *Patch Enterprise, Inc. v. McCall*, 447 F. Supp. 1075, 1080 (M.D. Fla. 1978).

In the present case, it is apparent that there is no prejudice to either Motel or the Department in this Court's consideration of any violation of the Southards' equal protection rights under the Fourth and Fourteenth Amendments to the Constitution of the United States. The lower court's failure to address the issue of such a equal protection violation in no way precludes this result.

The pleadings, depositions, answers to interrogatories and admissions on file in this case demonstrate that, regarding Plaintiffs' Second Motion for Summary Judgment, there are no genuine issues as to any material fact and that the Southards are

entitled to a judgment as a matter of law. Section 192.037(2) and (7), Florida Statutes, is unconstitutional as applied because it violates the Southards' equal protection rights as provided by the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

The Order Granting Final Summary Judgment to Motel and the Department is in error. The facts clearly demonstrate that the tax certificates are void *ab initio* and the application of Section 192.037(2) and (7), Florida Statutes, under either a due process or equal protection analysis, is unconstitutional as applied to the Southards. The Order of Final Summary Judgment, therefore, should also be reversed and the Southards Second Motion for Summary Judgment should be granted.